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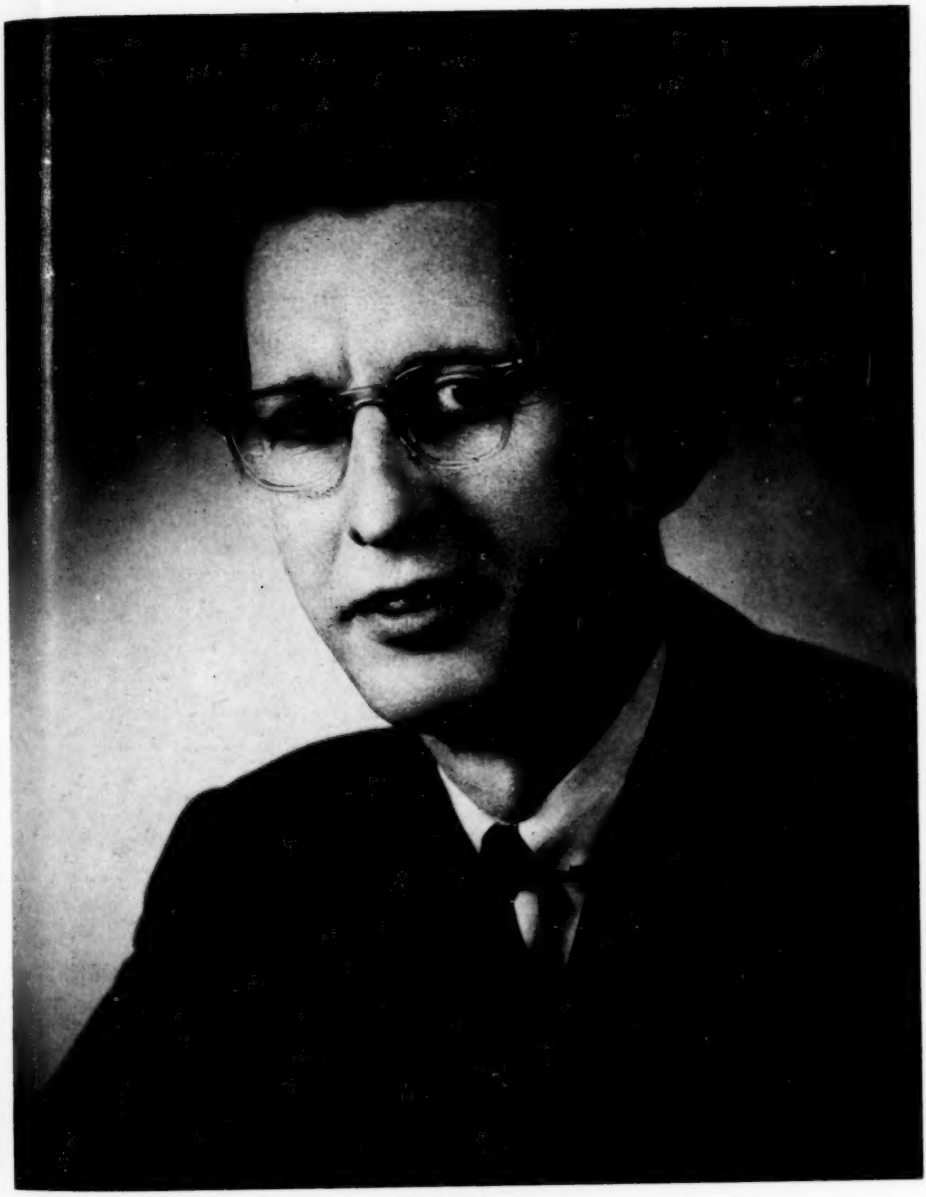

JOHN A. KLUWIN
President, International Association of Insurance Counsel
1956 - 1957

INSURANCE COUNSEL JOURNAL

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

THIS is my first opportunity to express to all the members my sincere appreciation to you for having named me as your President for the coming year. I am proud to be your President and fully realize the tremendous task ahead of me because of the enviable records and the high standards established by my predecessors.

This Association, and I particularly, am greatly indebted to Lester Dodd who just a year ago took a green team and welded it into a championship organization. It can only continue to prosper as long as each member contributes his time and talents. I look to you for your aid and assistance, and urge you to submit to our Journal Editor articles which will be of interest to our members.

* * * * *

1957 CONVENTION NEWS

Although many of us have just recently returned from a most delightful convention at The Greenbrier, it is not too early to begin to plan for the 1957 convention. Many of you are no doubt aware of the fact that the 1957 convention was originally scheduled to be held at The Greenbrier on July 11th, 12th and 13th. Last April we learned that the American Bar Association was planning its meeting in New York for that same time. Because of the mutual interests of many of our members in each of these organizations and the desire of your Executive Committee to cooperate with the American Bar Association, we were able, through the untiring efforts of G. Arthur Blanchet, Chairman of the Convention Site Committee, and with the cooperation of The Greenbrier staff, to have the convention site transferred from The Greenbrier to the Chalfonte-Haddon Hall Hotels at Atlantic City, New Jersey, beginning July 4, 1957.

At the recent convention at The Greenbrier, we became concerned because it appeared that the meeting of the Insurance Section of the American Bar Association was not going to be held on July 8 and 9, 1957, as we had previously been informed, and that our entire schedule might be upset. Since returning from The Greenbrier, I have been in contact with members of the official family of the American Bar Association and have been assured, as far as it is within its power to do so, that the Insurance Section of the American Bar Association will undoubtedly open its meetings in New York on July 8, 1957, and that our members, particularly those who have to travel great distances, will be able to attend our convention and then go on to the American Bar Association meetings in New York and London if they so desire.

You have become accustomed to receiving a letter in the early fall advising of the coming convention and the procedure to be followed in making your requests for reservations. Your response has always been most gratifying. However, if you do not receive a letter about the 1957 convention until approximately January 1, 1957, do not be alarmed. You need not write inquiring as to why you have not heard from the Association's office as we have been advised by the hotel staffs that you can be better served if the convention letter is sent out a little later than it has in the past.

Please mark your calendar now, setting aside the week of July 4, 1957, to attend the Association's convention and make your reservations promptly after receiving the convention letter from the office of the Executive Secretary.

JOHN A. KLUWIN
President

Biographical Sketches of Newly Elected Officers

President

JOHN A. KLUWIN, 735 North Water Street, Milwaukee 2, Wisconsin. Born Oshkosh, Wisconsin, September 16, 1907. Graduate of Marquette University Law School; LL.B. 1930 admitted to Wisconsin Bar, 1930; Past President of Milwaukee County Bar Association, member of Wisconsin State and American Bar Associations; former member of Board of Governors of Wisconsin State Bar Association; Fellow, American College of Trial Lawyers; member of Sigma Nu Phi and Beta Phi Theta Fraternities and Milwaukee Athletic Club; member of law firm of Bendinger, Hayes & Kluwin; former associate professor law at Marquette University. Married to Noreta M. Kluwin, six children, Mary Ann, John, Robert, William, Thomas and Michael. Member of I.A.I.C. since 1937.

President-Elect

FOREST A. BETTS, 900 Wilshire Boulevard, Los Angeles, 17, California. Born Rush Hill, Missouri, May 5, 1897, son of Amos Arthur and Lerena Betts. Married to LaVelle Nelson, 1926. Received A. B. and LL.B. Stanford University, 1922; admitted California and Arizona Bars, 1923. Fellow, American College of Trial Lawyers; member, American Bar Association, State Bar of California, Phi Delta Phi, Los Angeles Country Club, Jonathan Club. Democrat. Member of I.A.I.C. since 1936.

Vice Presidents

JAMES P. ALLEN, JR., 175 Berkeley Street, Boston, Massachusetts. General Attorney of Liberty Mutual Insurance Company. Born Brooklyn, New York, March 20, 1907. Graduate St. Johns University, Brooklyn, New York, LL.B. 1928. Admitted to New York Bar 1929 and Massachusetts Bar 1938. Joined legal staff of Liberty Mutual as trial attorney in New York in 1932, transferred to Home Office legal staff in 1938. Married; three sons. Member: Delta Theta Phi; Weston Golf Club; Webhannet Golf Club; Wellesley Club; Boston, Massachusetts, and American Bar Associations, I.A.I. C. since 1949.

F. CARTER JOHNSON, JR., 2008 American Bank Building, New Orleans 12, Louisiana. Born October 21, 1905, in New Orleans, Louisiana. LL.B. Tulane University 1927. Admitted to Louisiana Bar 1927, practiced since in New Orleans, Louisiana; partner in Porteous & Johnson; married to Josephine Mary Micheli; two children, Judith Eleanor Johnson, Charles Berdine Johnson. Member Louisiana State Bar Association; New Orleans Bar Association,Executive Committee 1955-58; American Bar Association; Delta Tau Delta Fraternity; New Orleans Country Club; Stratford Club; Episcopal Church; Member of I.A.I.C. since 1937.

Executive Committee

L. J. CARY, 28 West Adams Avenue, Detroit, Michigan. Born Mt. Pleasant, Michigan, December 18, 1893. University of Detroit LL.B. 1917. First Vice President and General Counsel Michigan Mutual Liability Company. Member: Delta Theta Phi; Detroit Athletic Club; Detroit Bar Association; State Bar of Michigan; American Bar Association; Vice Chairman, Insurance Section, American Bar Association. Admitted to practice in Michigan, Federal and Supreme Court of the United States. Member of Legal Committee, the Automobile Committee, the Health and Accident Committee, the Taxation Committee, Laws and Legislation Committee, Chairman of the Workmen's Compensation Committee of the American Mutual Alliance. Married to Lena M. Carey; five children, Donald J., Barbara L., Norman B., Jeri M., and Janet A. Member of I.A.I.C. since 1933.

PAYNE KARR, 1411 Fourth Avenue Building Seattle, Washington, February 15, 1909. A.B. University of Washington 1929; LL.B. George Washington University, 1932. Admitted to Washington Bar 1932. Married February 2, 1933, to Susan H. Fitch, four children, Susan, Bob, Bill and Cindy. Member of firm of Karr, Tuttle & Campbell. Member, American, Washington State and Seattle Bar Associations; American Judicature Society; Sigma Nu; Phi Delta Phi; Order of the Coif. Member of I.A.-I.C. since 1939.

LEWIS C. RYAN, 8th Floor Hills Building, Syracuse, New York; Partner; Hancock, Dorr, Ryan & Shove. Graduate Syracuse University College of Law. Married to Hildred Hier. Two sons, Lewis Hier and Whitney Hier. Trustee of Syracuse University; Fellow and Regent of American College of Trial Lawyers; State Delegate for New York to House of Delegates of A.B.A.; Member, Temporary Commission on the Courts of New York State. Member: American Bar Association, New York State Bar Association, Onondaga County Bar Association; American Judicature Society; O.T.C.; Phi Delta Phi; Alpha Chi Rho; Century Club, Onondaga Golf and Country Club; and University Club of New York City. Member of I.A.I.C. since 1938.

CURRENT DECISIONS

In each issue of the Journal there will be published two or three pages of Current Decisions. These will be brief digests of recent cases of particular interest to insurance lawyers. All members of the Association are urged to participate in this important feature of our Journal.

Reports of Current Decisions should be sent to your State Editor. Full credit will be given to all contributors.

FIRE INSURANCE— LOWEST RESPONSIBLE BID

In an important decision announced May 1, 1956, the Connecticut Supreme Court of Errors held that in determining the lowest responsible bidder for fire and extended coverage insurance on properties of the Housing Authority of the City of Hartford, put to public bid, estimated future dividend or anticipated return of unabsorbed premium deposit is lawfully deductible from the stated deposit premium. The opinion rendered by Chief Justice Inglis, in which all the other judges concurred, stated that it was the duty of the Housing Commissioners to determine, by using their sound judgment, which bid was in reality the lowest and upheld the award by the Commissioners to the Firemen's Mutual Insurance Company of Providence, Rhode Island, one of the Associated Factory Mutual Fire Insurance Companies.

The action was brought by the Hartford County Mutual Fire Insurance Co., et al., on June 28, 1954, for an injunction to restrain the Commissioners of the Hartford Housing Authority from awarding over $20,000,000.00 of fire and extended coverage insurance on various projects of the Authority to Firemen's Mutual Insurance Company and to reject Firemen's bid as not being the lowest responsible bidder. The Hartford County Mutual claimed that its bid submitted by the agency of Goodwin, Loomis, and Britton for a fixed premium of $86,997.45 for a 5-year term was the lowest of all the bids and that the Commissioners were required to award it the insurance as a purely ministerial act.

The bid submitted by Firemen's was for a single premium deposit of $114,567.00 with an estimated return of unabsorbed premium at the end of the 5-year term of $57,283.50, leaving a 5-year net premium of $57,283.50. The estimated return was made on the basis of the returns made to policyholders over a period of more than 10 years previous to 1954.

This decision resolves the controversy in Connecticut as to the consideration that may be given in evaluating a bid made by a dividend-paying company as compared with one made by a company charging a fixed premium under lowest responsible bidder statutes. *Austin v. Housing Authority of the City of Hartford,* 143 Conn. 329. (Contributed by John D. Wilde, Providence, R. I.)

* * *

INSURANCE COVERAGE— FILING OF SR-21 BY INSURER

Four separate actions were brought by the driver and three passengers arising out of a collision between a vehicle driven by one of the plaintiffs and a vehicle driven by A, who died in the accident, against B and his insurer on a garage liability policy. A had been a former employee in B's garage and was a personal friend of B, but the employment had been terminated about five years prior to the accident. B was neither the owner nor driver of the car. Just prior to the accident A was using facilities in B's garage to repaint a car for a patron of A's service station, without express permission and without remuneration to B, and the accident occurred on A's return trip from the garage. Motions for summary judgment were made in each of the cases on behalf of B and B's insurance carrier.

It was contended, in opposition to the motions, that a relationship existed between A and B which would render B and his insurer liable for the negligence of A.

The trial court denied the motions for summary judgment and on appeal the Wisconsin Supreme Court stated that the burden of establishing the relationship be-

tween A and B was on the plaintiffs and that they failed to show, by affidavit or other evidence on the motions for summary judgment, that they could present any evidence to support such inference and it therefore held that the motions for summary judgment should have been granted as to B individually.

The supreme court, however, further held that the denial of the motions was proper as to B's insurance carrier since, after investigating the facts of the accident, it filed an SR-21 form in compliance with the Wisconsin Safety Responsibility Law, which constitutes written notice to the Motor Vehicle Department that a policy of insurance is in effect, both as to the owner and operator of the vehicle involved, which in this case might have applied to A. Such filing, said the Wisconsin Supreme Court, constitutes an admission against interest and evidence bearing on the question of B's insurer's liability to the plaintiffs and therefore there was an issue on which the plaintiffs were entitled to a trial. The court further stated that an insurer can make itself liable on a policy issued where such authorized filing was made after investigation of the facts, thus admitting coverage, intending to be bound thereby even though there might not be actual liability.

One justice dissented on the grounds that the filing was an apparent mistake and that the plaintiffs had made no change of position in reliance on the filing. *Laughnan v. Griffiths,* 271 Wis. 247, 73 N.W. 2nd 587, (Wisconsin, 1955)

In a subsequent decision involving this point, A, a minor, had received restricted permission to operate and use the vehicle but not to allow others to drive it. On a return trip from a beach party on July 29, 1951, A asked B, his minor friend, to drive the vehicle and an accident occurred injuring a number of guest passengers. After the accident the insurance carrier on the vehicle caused an investigation to be made by an independent investigating agency and, after receiving the investigator's report, filed an SR-21 form on October 29, 1951. On November 10, 1954, the investigator on behalf of the insurer wrote the Motor Vehicle Department and advised that the filing had been made through error and asked that the SR-21 be amended to cover the owner alone and not the operator. This request was denied. On the trial, the trial court denied the plaintiff's request to offer the SR-21 in evidence but, despite this, held that there was implied consent to the use and operation of the car by B and entered judgment against the insurance carrier.

On appeal to the supreme court, it was held that the owner had not given permission but had restricted the use of the car. A new trial, however, was ordered on the basis of the *Laughnan* case, *supra,* to try the issue of whether the insurer filed the SR-21 intending to be bound so that it would be bound on the question of coverage and thus has assumed liability.

The justice who dissented in the *Laughnan* case wrote the majority opinion, but indicated that he had not changed his views on the over-all question.

One justice wrote a concurring opinion indicating that he felt that it was the function of the jury, as well as that of the court, to supply the missing insurance contract and for the court to determine from the jury verdict what the terms of the contract are.

The justice who wrote the majority opinion in the *Laughnan* case in a concurring opinion amplifies the scope of the previous decision. He states in his concurring opinion that the Safety Responsibility Law and not the secret intent of the company is to govern and that the words "intending to be bound thereby" are to be interpreted to mean no more than that the SR-21 is filed for the purpose of complying with the law. He further stated that a mistaken idea as to the legal consequences which may result from such filing will not relieve it from liability.

Prisuda v. General Casualty Co. of America, 272 Wis. 41,74 N. W. 2d 777 (Wisconsin, 1956). (Contributed by Herbert Terwilliger, State Editor for Wisconsin, Wausau, Wis.)

* * *

SETTLEMENT BY INSURER—ASSURED'S CLAIM BARRED

The recent decision of *McKnight v. Pettigrew,* 91 S. E. 2d 324, (W. Va. Supreme Court, February 28, 1956) involved a slightly different approach to the problems arising when a liability automobile insurer

settles a claim against its insured, even though its insured is seeking a recovery against the other party.

In this case, two owner-drivers were involved in an automobile accident and both sustained injuries. Actions were instituted by each of the parties. McKnight had insurance with the Aetna Casualty & Surety Company. That company employed Palmer to represent its interests. McKnight also employed Palmer to represent his individual interest.

Aetna's representatives settled with Pettigrew by paying him $5000.00. An order was entered in Pettigrew's action against McKnight, showing it had been settled and dismissed with prejudice to Pettigrew. This order was entered on the 17th day of February, 1955. That was the date on which the cross-actions, which had previously been consolidated, had been set for trial.

The Circuit Court of Kanawha County, West Virginia, was engaged in another trial on February 17th, so that McKnight's action against Pettigrew was continued until the 18th of February.

On the 18th of February, Bryan, who was asserted to be acting solely for United States Fidelity & Guaranty Company, Pettigrew's insurance carrier, interposed a special plea setting up the settlement with Pettigrew by McKnight. The plea asserted that the settlement was with the knowledge and approval of McKnight.

On behalf of McKnight, the allegations of the plea were denied insofar as the plea stated that the settlement was with the knowledge, consent or approval of McKnight.

The court held, on demurrer to the reply, that McKnight was barred by the settlement. It referred to the cases which hold that a settlement by a liability insurer, without the consent of the insured, does not bar an action by the insured. It said that question was not involved here because it was undenied that the attorney for McKnight's insurance carrier was also McKnight's personal attorney, employed before the order of settlement was entered, and that McKnight, through his attorney, was present in court when the order of settlement was entered. (Contributed by Paul S. Hudgins, State Editor for West Virginia, Bluefield, W. Va.)

MARINE INSURANCE— ENGINE OPERATION EXEMPTION

Insured, while taking his 90 mile an hour racing speedboat out for a test run on a tributary of the Chesapeake Bay, momentarily lost his bearings due to water spray on his windshield, causing him to miss a guide buoy. Upon regaining vision, he saw a small pleasure craft some 200 feet ahead. He immediately cut off his engine and made an effort to avoid collision. His boat, travelling at about 35 to 40 miles per hour at this moment, continued to skid forward and struck the smaller craft broadside, causing both crafts to sink, injuring one occupant of the smaller craft, and killing the other.

Insured was required to pay $22,400 in damages. He then sued his insurance carrier upon a marine insurance policy which contained the following pivotal language:

"It is understood and agreed that *this insurance* is *free* from *claim of loss or damage*:

"1. During such time as the vessel's engine is operating.

"2. *Resulting from* the operation of the vessel's engine *whether caused by a peril insured against or not.*" (Emphasis by the court.)

In the district court proceedings, insured argued that the cause of the loss was his own negligence, that the engine was not operating and therefore the carrier was liable to him on the policy. The carrier argued the claim was one expressly exempted from the policy by the above quoted language. The district court sustained the insured's claim. The court of appeals reversed on the ground that although insured's negligence concurred, or perhaps even supervened, it was nevertheless incidental, "for the operation of the engine was the predominant, efficient, causative factor of the claim for loss or damage." *American Insurance Company of the City of Newark, N. J. v. Thomas T. Keane,* 233 F.2d 354. Contributed by Alexander M. Heron, State Editor for the District of Columbia, Washington, D. C.)

Newly Elected Members of The International Association of Insurance Counsel

Admitted Since March 19, 1956

ADAMS, RICHARD B.—Miami 32, Florida
Brown, Dean, Adams & Fischer
511 Biscayne Building

ALLEN, BIBB—Birmingham 3, Alabama
London & Yancey
11th Floor, Comer Building

BAKER, E. BALLARD—Richmond 19, Virginia
Wicker, Baker & Shuford
501 Mutual Building

BAKER, JOHN W.—Knoxville 02, Tennessee
Poore, Cox Baker & McAuley
301 Fidelity-Bankers Trust Building

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Chambliss, Brown & Hodge
1111 Provident Building

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1025 Pyramid Building

JENNINGS, JOSEPH F.—Miami 32, Florida
Dixon, DeJarnette, Bradford & Williams
908 Ainsley Building

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80 Broad Street

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Lamb & Hoge
68 Post Street

LINSTER, JOHN E.—Wausau, Wisconsin
Vice President & Claim Manager
Employers Mutuals of Wausau
407 Grant Street

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Boswell, Loeb & Livaudais
318 Richards Building

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402 Masonic Temple

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Ruark, Young and Moore
1008 Insurance Building

MCMONIGAL, JAMES L.—Berlin, Wisconsin
McMonigal and Wildermuth
First National Bank Building

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46-48 Hawley Street

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407 Krise Building

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701 West 40th Street

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508 Watts Building

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Bremner, Parker, Neal, Harris & Williams
905 Mutual Building

WILMARTH, HARRY E.—Cedar Rapids, Iowa
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1120 Merchants National Bank Building

PROCEEDINGS

29th Annual Convention International Association of Insurance Counsel

THE GREENBRIER
WHITE SULPHUR SPRINGS
WEST VIRGINIA

GENERAL SESSION
JULY 12, 1956

The General Session of the Twenty-Ninth Annual Convention of the International Association of Insurance Counsel convened in the auditorium of The Greenbrier, White Sulphur Springs, West Virginia, at 9:35 o'clock A.M., President Lester P. Dodd, Detroit, Michigan, presiding.

PRESIDENT DODD: Will the Twenty-Ninth Annual Convention of the International Association of Insurance Counsel now be in order. If you will rise, please, I will ask the Reverend D. L. Beard, of the First Presbyterian Church, White Sulphur Springs, to deliver the Invocation.

THE REVEREND D. L. BEARD: Our Father, we are thankful unto Thee for our many blessings, living in this day and in this country, for the blessings of freedom and the blessings of having associations like this, and meeting together in a place like this.

We thank Thee, too, for the spirit that enables us still to put God in our business life as well as in our religious and personal and social life.

We ask Thy blessing this morning upon this Association in its meeting here. May it be pleasant and may we be under the guidance of Thy Spirit in all of the actions that we take.

We make our prayer in Jesus' name and for His sake. Amen.

PRESIDENT DODD: Mr. Morris.

MR. STANLEY C. MORRIS: I noticed that in calling us to order the president seemed to be very inadequately equipped with a substantial noise-making piece of equipment. I wasn't sure whether he was using a signet ring or a pocket knife, but it ill behooves an association such as ours to have our president so ill equipped, so we have provided, in accordance with the old-established precedent, Mr. President, a very handsome gavel, beautifully fabricated and appropriately engraved, which we hope you will accept and always enjoy as a memento of your year of wonderful service to this wonderful organization.

A year ago we welcomed Les Dodd as president with great expectations and those great expectations have been more than realized. He has guided this Association through a busy year with the good judgment, the enthusiasm, the effectiveness, which we all expected of him, and upon that great year, Les, I congratulate you on behalf of the entire Association, and present you with this gavel.

PRESIDENT DODD: Thank you sincerely, Stanley. I accept it in a humble spirit and I shall certainly treasure it as symbolic of the great honor that you have paid me in putting me into this office.

We have been at White Sulphur Springs on many previous occasions. We have come to regard this as perhaps the real home of the Association. It is our privilege to be welcomed here today by the first citizen of the State of West Virginia, a gentleman who has performed that function before, the Governor of this great state, a member of our profession and I believe a former attorney-general of the state—incidentally I hear that he is presently the nominee of his party for the United States Senate—and while I can't offer the Governor any votes, since most of us do not have the franchise in this state, I do assure him that he has our best wishes.

It is my privilege to present to you Governor William C. Marland of West Virginia. [Applause.]

Address Of Welcome

HONORABLE WILLIAM C. MARLAND
Governor of the State of West Virginia

THANK you, Mr. President, for the plug.

I am very happy to be here this morning to again welcome you to the greatest hotel in the universe. This is a typical West Virginia day. You know, I always enjoy claiming the chairmanship of the weather committee on days like this. On other days when other states' weather comes over West Virginia (laughter), we usually blame it on my opponent. (Laughter.)

At a time like this, of course, a man has to tell a story. Well, I can be motivated by several thoughts in choosing the story. The obvious one here, of course, is about insurance of some type or kind, but not wanting to be derogatory to this fine organization, I thought we just might as well tell one about politicians, since they can take it, they are so used to it. Well, that posed another problem. There might be people here who didn't belong to the Democratic Party, so it wouldn't do to tell one about the Republican Party; and there might be some here who did belong to that party, so we couldn't tell one about the Democratic Party, so I decided to be absolutely fair, bi-partisan and unbiased in the matter and tell two. The first one is about the Republicans and the second one is about the Democrats, so you can take your choice.

The first one really happened over in my home county of Wyoming—a lot of things happen over there, in my county of Wyoming, just about 70 miles due west of here nestled down in the mountains. There was a stranger came up over Skin Poplar Gap and he got lost. He went up on the mountainside to a nice neat clean cabin—I might say also that my county is extremely Democratic, as per registration —and he passed the time of day with this fellow and asked direction and a few more things and as he left, as he walked off the porch, the old mountaineer said to him, "Say, who won the last election?"

The stranger was somewhat startled, this being about two years later. "Why," he said, "Eisenhower did. Don't you fellows get the papers?"

"Yes," said the man, "we get them, but the Republicans won't read 'em to us." (Laughter.)

Now, lest anybody on the other side, any Democrat, gets mad at that, we will fix 'em right now.

In another section of this great state you have an unusual situation commonly referred to as the eastern panhandle, and there you have, due to a conflict of some hundred years ago almost, a situation where one county is extremely Democratic and the adjoining county will be extremely the other way. Such is the situation as between Hampshire County and Morgan County, the first being very Democratic and the second very much the other way. (Laughter.) I was about to say unenlightened, but I didn't. (Laughter.)

Anyhow, both of those counties are extremely famous for the great West Virginia apples, some of which you may find around here later on in the day—very fine, very fine apples, in both counties. Well, a young fellow, who happened to be a Democrat, was hitch-hiking one day from the county seat of Hampshire County to that of Morgan County. He got along fairly well until he crossed the county line. He was standing there trying to get another ride. A fellow would drive by, open the car door, say, "Get in." Then, "What's your politics?"

"Oh," he said, "I am a Democrat."

"Get out." And the fellow would drive on.

That happened four or five times. This poor Democrat decided that if he was going to get to the county seat of Morgan County he had best change his politics right quick. So he did.

The next car drove up, "Get in. What's your politics?"

"Oh, I am a Republican."

"Well, that's fine." So away they drove down towards Berkeley Springs, and as they drove along—it was September—the apples were beautiful, beautiful. It was just before harvest time. Great big red apples were hanging there on both sides of the road, as they do in those big orchards. So

the man driving the car stopped and said to our young, newly-changed friend, "You had best go and get us some apples to eat on our journey."

The young man said, "Well, is this your orchard?"

"No, but it doesn't make any difference. Go over and get us a bag of apples."

The young man said, "I don't know if I should do that."

"Oh," he said, "if you are going to ride with me, you go over and get a bag of apples."

So he gave him a sack and the boy climbed the fence and got a few dozen, threw the sack over his shoulder and started back. As he came back he was mumbling under his breath, like he was griping real bad, and as he threw the apple sack in the back of the car, the driver said to him, "Boy, what were you mumbling to yourself about as you came back?"

The boy said, "I was just thinking, I have only been a Republican five minutes and they have got me stealin' already." (Laughter.)

Now you can take your choice. (Laughter.)

Seriously, I do want to welcome you all to West Virginia—*West* Virginia. You may notice I place some emphasis on the word "West." We are very happy that you chose White Sulphur for your convention, for your conferences, and I am sure that the facilities here will live up to your expectations, as many of you know.

This business of bearing down on the word "West" has become quite frequent amongst West Virginians. There are some people in this world who don't realize that there is a West in front of the word "Virgina," that there is a West and an East Virginia. We have been one of the 48 states for some 92 years, but you would be surprised at how many people who burn our coal and use our oil and gas and work with our tools, wear clothes made here—those ladies in the audience who admire Fostoria and such glassware as that—some people invariably confuse us with a little state just across the mountains over here which serves as a buffer to keep out the Atlantic Ocean, to keep it away from this great storehouse of treasure.

Let me hasten to say that I in no way would want to deprecate the mother state of Virginia, irascible though the old lady can be at times. Virginia served a very useful purpose in the history of our state. When the earliest immigrants crossed the Atlantic, you remember, and landed in the boggy tidelands of eastern Virginia, they speedily fixed their eyes on the range of mountains to the west, and like the Children of Israel of old, plunged into the wilderness which separated them from the Land of Promise beyond those mountains. That great land is now known as West Virginia.

It was the territory of Virginia, at that point, that served to separate the men from the boys. The weak among those pioneers fell by the wayside and I am told that some of them still survive east of these mountains. (Laughter.) But the survivors of the perils of that wilderness didn't pause to rest, I assure you, until they had topped the violet ranges which are those western barriers, and from the lofty summits they looked down with enraptured eyes upon the Land of Promise, the Eldorado of the Western World, which the good Lord had been building for them ever since he took note of his architectural errors in the Garden of Eden, and undertook to create a land of true enchantment commonly known as West Virginia.

Now, some of those survivors who still exist east of the mountains even thrive, comparatively speaking, on what the mosquitoes choose to leave, and so forth.

You are in West Virginia. We hope that you will discover us while you are here. We hope that many of you will take a homeward path that will lead you across, north, south, east or west, what we think to be a very beautiful and richly-endowed state.

If your course is westward, it will perhaps be through the capital city of Charleston and a chemical empire of first importance in the industrial world.

If you go further south by way of Bluefield and Beckley, you will be in the heart of the billion dollar bituminous coalfields, which have supplied the nation with 6½ billion tons of fuel in the last 92 years and we only have 61 billion tons left, so use it sparingly.

Or should you continue on west from Charleston, you will see the famous Blenko Glass plant and the world's largest nickel and nickel-alloy plants at Huntington, one of our most beautiful cities.

Should your course from Huntington parallel the Ohio River northward, you

will see an awakening industrial valley which has come to the attention of the entire United States. There, too, you will see much of interest: a great glass works, new aluminum plants, and more chemicals.

Such is the State of West Virginia. We are glad you are here. We wish you could see it all. We hope that your deliberations will be good, but we hope also that you find time to enjoy this land of enchantment of which I spoke a few minutes ago.

I assure you if there is anything that the state government can do to facilitate your deliberations or your pleasures while you are here, you have but to let us know.

In the meantime, good luck, God bless you, and come back soon. Thank you very much. (Applause.)

PRESIDENT DODD: Thank you, Governor Marland.

By way of response on behalf of the Association to the cordial welcome that has been given us by Governor Marland, I think it entirely fitting and proper that the gentleman who speaks for us in that behalf be the member—a former member of the Executive Committee of this Association, a man who has been Chairman of the Convention Site Committee and therefore responsible in large degree for the selection of the places at which we hold our conventions—to respond to that welcome, and I ask Mr. G. Arthur Blanchet, of New York, to perform that pleasure. Mr. Blanchet. (Applause.)

Response To Address of Welcome

G. Arthur Blanchet
New York, N. Y.

MR. President, Governor Marland, members and friends of the Association: I am indeed grateful for the opportunity of making a brief response to such a good friend of this Association, Governor Marland.

The position of a respondent is usually a satisfactory one, but here at the Greenbrier it is even more comfortable, for we have nine cases precisely in point.

This is, as you know, Governor, our ninth visit to the Greenbrier, and we look forward to many more pleasant and successful meetings in your state.

Every practitioner knows that one white horse case is convincing, but when you have nine white horse cases, that is really a convincer.

The spontaneous laughter and the rapt attention to the address of welcome is a far greater tribute than anything which might fall from my lips. I use the phrase "rapt attention" advisedly, as it sprung the opportunity of mentioning by way of contrast a little courtroom story of a lady juror.

During the first three days of an arduous trial, this lady juror sat gazing out the window constantly, completely oblivious to everything that was going on, and finally the judge, in a moment of some exasperation, said, "Lady, I do wish you would pay some attention to the evidence."

The lady looked up and smiled and said, "Judge, I am not interested in the evidence. I want to make up my own mind." (Laughter.)

On behalf of each member of this Association, their ladies and their guests, I want to say to you, Governor Marland, how much we appreciate your visit with us, and we thank you sincerely. Thank you. (Applause.)

PRESIDENT DODD: Thank you, Art.

You know, I noted, during the Governor's very interesting talk that he told two stories. One of them evoked responsive laughter from one half of the audience, and the other from the other half. There is one gentleman in this audience who laughed heartily at both. Perhaps not many of you know it but we have among our membership a gentleman with whom you are all acquainted who is a delegate in his own state this year to both the Democratic and Republican Conventions. (Laughter.)

It is my pleasure to call upon him now for a pleasant task that has become a custom in this organization, that of intro-

ducing to you and presenting to you the new members of our Association who have become such since the last annual meeting and who may be in attendance at this meeting.

I give you that versatile gentleman—politically versatile—J. A. Gooch, of Fort Worth, Texas. Mr. Gooch. (Applause.)

MR. J. A. GOOCH: Thank you, Mr. Dodd. I presume with that introduction that I can qualify as the mugwump of all time. (Laughter.)

(Mr. Gooch thereupon presented the new members.)

PRESIDENT DODD: I know you will agree with me, ladies and gentlemen, that we have presented to you a fine-looking crop.

Now we come to the next order of business noted on your program, which is no doubt responsible largely for the splendid attendance that we have here this morning, namely the report of the president.

President's Report

LESTER P. DODD
Detroit, Michigan

SECTION 1 of Article X of the By-Laws of this Association provides in part as follows:

> "The president shall preside at all meetings of the Association and of the Executive Committee. He shall, with the cooperation of the Executive Committee, arrange a program for the annual meeting of the Association. He shall deliver an address at each annual meeting."

As you will note, that section makes no provision with respect either to the quantity or the quality of the required address. You will note also that your program makes no reference to a President's address but does call for a report from the President. With your permission, therefore, I shall attempt a compromise.

I propose to borrow a device that I believe has saved the Congress of the United States from extinction through asphyxiation; namely, that of extension of remarks in the Journal. I shall submit to the able Editor of our Journal a document entitled "The Vanishing Tribe," which, should he find printable, and which, should any of you find time to read, you may regard as the President's address.

My report will be brief. When I took office at the close of the Coronado meeting, I expressed some apprehension because of what appeared to be extraordinary problems facing us. We entered upon the work of the Association this year with a new President, a new Executive Secretary, a new Journal Editor, a new Secretary, seven new members of the Executive Committee, a new central office, and some new and untried methods of operation.

It was to be expected that a great deal of confusion would exist and that inexperience and lack of coordination would manifest itself in many ways. It is with genuine pleasure that I am able to report that my fears were groundless. Our new executive office under the direction of Blanche Dahinden has operated with remarkable smoothness and efficiency. Our Journal speaks for itself. It has not only been maintained at the high level that we had come to expect under the editorship of George Yancey but has been expanded and developed under the able direction of Bill Knepper and his associates in keeping with the expansion and development of the Association as a whole. Although he had a tremendous pair of shoes to fill, our new Secretary, Frank O'Kelley, has operated with the efficiency that we have come to expect from that office.

Great credit must be given, of course, to our President-Elect, John Kluwin, our immediate Past President, Stanley Morris, and our veteran Treasurer, Charles Pledger, for their invaluable aid correlating the functions of the various offices into a smooth working whole. To them, I cheerfully and humbly acknowledge my debt of gratitude.

Our mid-winter meeting at Chandler, Arizona, was well attended and was charac-

terized by the complete and constructive cooperation of all members of the Executive Committee. To them, my heartfelt thanks.

Later during this program the chairmen of standing committees will be presented to you for your recognition. All of them have contributed greatly and willingly of their time and talents in the work of the Association. To each of them, my deep appreciation.

We are gathered here in the largest convention in our history. All who would have liked to attend could not be accommodated. This is a matter of major regret but seems to be the result of an insoluble problem. While it is of small comfort to those who were unable to obtain reservations, it is at least convincing proof of the popularity of our annual meetings.

My report can be summed up by saying that we have had a busy and, I believe, a happy and reasonably successful year. At the close of this convention I shall turn over the gavel to a successor whose record is such as to guarantee that the program of the Association will be carried on with heightened vigor and vision. Until then—to all of you—my deep appreciation of your aid and cooperation and my affectionate gratitude for having accorded me this honor and the happy privilege of serving in this office.

The Vanishing Tribe

LESTER P. DODD*
Detroit, Michigan

AS the remnants of our once dominant American Indian tribes have been relegated to the reservations—as the Incas and other once proud tribes have disappeared from the face of the earth—so, do I believe that our profession is today confronted with the more or less imminent disappearance from the American scene of the Trial Lawyer. To me the prospect is not a happy one.

I have devoted more years to the practice of law than I care to acknowledge. They have been, in the main, happy and exciting years. The greater part of those years has been devoted to trial work and I regard myself as fortunate that I have been privileged to be an advocate. Of course, as an inevitable result, I will die a poor man. The material reward of that type of practice is seldom more than a modest living. I might have said—a comfortable living—except for the fact that most of us manage, along the way, to accumulate a flock of peptic ulcers as one of the occupational hazards of the trade. But I truly believe that I have been permitted to *live* the law in a way that is not permitted to a lawyer who has not experienced the thrills and chills of the court room.

I am prompted to make some of the observations that I want to make on this subject by some recent personal experiences that have brought home to me, as nothing else could, a realization of the drastic changes in law practice that have been and are taking place.

For many years my firm has handled a considerable volume of litigation. In recent years the greater part of this has been in the defense of negligence and personal injury cases, since, as we all know this type of litigation is mainly responsible for keeping our courts occupied today. But today I am faced with a likelihood of being forced to eliminate that practice from my office because I am unable to find young men who are sufficiently interested in becoming trial lawyers to carry it on. They say to me frankly: "I don't want to undertake the drudgery of trial work." "I can make more money without inviting the hypertension and coronary occlusions that trial work bring." "I want a more quiet (and incidentally) more lucrative office practice."

I have no quarrel with the individual who feels that way. From the standpoint *of the individual,* there is much to be said for his point of view. But in my humble

*This is the annual President's Address which, by Mr. Dodd's choice, appears for the first time in the Journal, instead of being delivered at the Convention.

opinion he has missed the whole point of the lawyer's being. He has missed the distinction between being a lawyer and a mere hired hand. He has failed to understand that advocacy is the very heart of the lawyer's function—that which sets the lawyer apart from and above those who simply supply counsel or act as agents for others in business transactions.

Personally, I have never been able to believe that any lawyer is capable of drafting the *best* will that can be drafted unless he is able to visualize himself defending that will under contest in a court —to draft the *best* contract that can be drawn unless he can see himself at counsel's table in the trial of an action in which he must defend his handiwork—or to give the best possible counsel and advice to his clients in relation to matters that may be under fire in the court room, unless he can project himself into that court room as an advocate in the case.

I can make no claim to having tried a record number of law suits, but the number in which I have participated to some degree over a period of years has been considerable. A scattered few of them have been important. Many have been trivial. Some have been tragic. Others have been comic. A few have been dramatic. Many have been drab. But almost all have been, in some way, fascinating because they have involved—not theoretical—but living law. Not textbook—but personal law. Not legal maxims—but human problems.

What lawyer who has spent his entire practicing career behind a desk or among the musty tomes in his library has experienced a thrill to compare with that of hearing a jury foreman nervously clear his throat and announce a winning verdict? What juicy fee for consummating a corporate merger (or at least what's left of it after taxes) has ever bought more satisfaction than that produced by breaking down a perjuring witness by an inspired—or lucky—cross-examination? What thriller on TV or in the movies can furnish one-half the suspense that is involved in waiting for a jury to make up its collective mind?

In the court room and no where else does the law become a living thing. There the law is not a dull or dry or abstract thing. There the law touches and surrounds people and itself is touched and altered and shaped by having come in contact with, and been applied to, human beings and human disputes and problems. There and no where else is the law truly made.

Where and how will it be made when the trial lawyer has passed? Where and how will it be made when the court room has given way completely to the office of the board or commission or star chamber tribunal which is all that is left of a court when the advocate has been removed? I express the unequivocal opinion that our system of court administered laws cannot endure without advocacy. And I express the fear that the art and the strength of advocacy will soon be a thing of the past unless we of the profession give serious consideration to the reasons for its decline.

What are some of those reasons? I venture to express a few of my own opinions on the subject:

I dare say that most lawyers, if asked, would put the answer primarily on an economic basis. We hear the individual lawyer say repeatedly—"I can make more money by staying out of the court room. I cannot afford to be an advocate". Unfortunately, unless he is there on a contingent fee basis, that is all too true. But it remains true with respect to any individual lawyer only as long as there are other lawyers who *are* willing and can afford to be advocates. If the time comes when there are no advocates, there will be no legal profession—nor in fact need for one. In my judgment there will continue to be advocates just as long as our system permits and encourages advocacy and no longer. And *if and when* that day comes that none of us can *afford* to be an advocate —then *none* of us can afford to be a lawyer.

Certainly, however, the decline of advocacy is not wholly unrelated to financial considerations and I believe that the economic aspect of the situation has sufficient bearing on the matter of causation to deserve at least brief mention.

On this phase of the matter, let me hasten to say that this is not a plea for more liberal reimbursement of the defense lawyer. The fee of any lawyer in any specific case is a matter to be resolved by the individual lawyer and the individual client and it would be both presumptuous and in exceedingly poor taste for me to attempt to generalize on the subject. But if we are to admit that more and more lawyers are withdrawing from trial work, particularly

in the defense field, and that fewer and fewer young lawyers are entering that area of the practise, we must at least recognize the relationship to the problem of the evergrowing spread between the income of the capable defense lawyer and that of the plaintiff specialist or that of the lawyer engaging in other types of practise.

Even if it were to be granted that the problem of the compensation of the defense lawyer has an important bearing on the problem of the decline of advocacy, I would not suggest that the solution lies in the simple expedient of jacking up the defense lawyer's fees to the point where they will equal or even approach those of the plaintiff specialist. Such approach would not alone be degrading to our profession, but would be wholly unrealistic. I suggest rather that the legal profession may well give earnest consideration to the severe restriction of the contingent fee as a vital step in the preservation of advocacy and hence in the preservation of our profession.

Without criticism of the contingent fee on the basis of its propriety, in fact recognizing its practical necessity in many cases under proper safeguards, I submit that as it is generally employed today it constitutes a real threat to the survival of advocacy. Without the defense lawyer there can be no place for the plaintiff lawyer. When all lawyers have deserted the defense side of the table, either to find more lucrative employment in other fields or to get on the gravy train, it will quickly be found that the gravy train has been derailed. The inevitable result of more and more "adequate" awards which are inseparably related to more and more "adequate" fees must eventually be to compel the creation of other tribunals and the adoption of other methods of resolving such matters, in which I believe I can safely predict that our profession will have a less prominent part.

No, I think the decline of advocacy cannot be attributed wholly, and perhaps not even primarily, to economic causes. The true advocate has a virus in his bloodstream that is neither caused nor cured by money. I think there are at least two other phases of the matter that are sufficiently vital to deserve mention.

The first is a failure, on the part both of our profession and the public, to appreciate the absolute necessity of keeping our court administered system of laws strong and virile and functioning. The second is a tendency on the part of our own profession to attempt to meet public criticism directed against courts and lawyers on account of their alleged slow and cumbersome procedures, by adopting ill-conceived remedies which actually contribute to the further weakening, rather than the strengthening, of our judicial system. It is to the latter of these two causes that I want to address myself very briefly.

In earlier days a good trial lawyer had to be a good and careful pleader. Today, because of the emphasis that has been placed on simplification, there is no pleading worthy of the name. Any careless superficial excuse for a statement of his cause of action is sufficient to get a litigant into court and to keep him there. Amendment at any stage is automatic. Why take the time and trouble to analyze a case carefully before starting it? In fact the more sloppily it is pleaded, the more room there is for switching theories whenever and to whatever extent it appears necessary in order to achieve the desired result. The opportunist and not the careful pleader has all the advantage.

Please do not misunderstand me. I am not opposed to changes and improvements in the practise. I do not advocate a return to the archaic and outmoded pleading and practise of times gone by. On the contrary, I have, for years, taken an active part in efforts to improve the functioning of our judicial system. There is much that is good in the modern practise and much more room for improving it and making it more useful and efficient in the true administration of justice. But change often is not improvement and oversimplification may tend to create more evils than were intended to be corrected.

Take for example the modern discovery practise. I believe that basically it is a step forward and when properly used and controlled furnishes a useful tool in the more efficient and just resolution of litigated disputes. But under the modern tendency to permit and encourage its *uncontrolled* use, it is difficult for me to imagine a greater threat to justice.

The modern cry is "take the surprise out of the law suit". My reply is—that when you have eliminated surprise from the law suit, you have gone a long way toward eliminating justice from the court room.

The advocate has no more potent weapon against perjury and trickery than surprise. The ever present fear of surprise and consequent embarrassment does more to discourage the unscrupulous lawyer and the unscrupulous litigant than all the discovery procedures that have been invented.

Another of the modern battle cries so frequently heard is "speed". Great emphasis is placed by those who are re-writing our procedures on speed in the disposition of litigation. Up to a point, this is a laudable effort. There is no question but that in many jurisdictions the trial of cases lags disgracefully. It is true that justice delayed too long becomes injustice. But it is equally true that speed in the disposition of a law suit does not guarantee but often defeats justice.

To those both within and without the profession let me warn that the tendency to judge the operation of the courts and the legal profession by the production standards of industry is a dangerous one. There may be faster, and in some respects more efficient, ways of deciding disputes than by litigation. But let me assure you —there is no safer way. There can be no automation in the dispensation of justice.

Among our American institutions none is more vital to our system of government than our courts. From the very nature of their function it is easy for the public to become impatient with them and to fail to realize fully the unfillable gap that would be created were we to attempt to turn to some other method of deciding the inevitable disputes that arise among men. Because that is so, it is a continuing obligation of our profession to do all in our power to bring about a better understanding on the part of the public of our legal and judicial systems and to bring our profession closer to the people.

But that better understanding between our profession and the public must be accompanied by a better understanding within our own ranks, of the dangers of a too drastic tinkering with our trial procedures. Let us not agree too readily to take the "surprise" out of law suits. Let us not absorb too readily the fallacious doctrine that "speed" insures justice. Let us not accept casually the false and dangerous idea that the administration of justice can be made more efficient by the installation of production lines and the adoption of automation.

I believe that the changing conditions of practise which reflect too strongly the fallacious doctrines of which I speak, are slowly but surely reducing the advocate's function to a common level of automatic mediocrity. To the extent that this is true, advocacy is becoming less and less attractive to the lawyer. To me this suggests grave dangers, since the decline of advocacy—in the long run—means the decline of the legal profession.

I hope you will agree with me that the dwindling tribe must not be allowed to vanish.

Report of The Secretary

A. Frank O'Kelley
Tallahassee, Florida

LET me first say that it has been a real pleasure to serve this year as your Secretary.

One of the most pleasant duties of the office has been to write letters of welcome to 116 new members of the Association. There were, on July 7, 1955, 1551 members. During the year there were lost a total of 51—32 through resignations, 14 by death and 5 who were dropped for nonpayment of dues. This leaves a total membership at this time of 1616, or an increase of 65 over a year ago.

During the year there were processed 135 applications for membership. Of these, 116 were approved, 15 were rejected, 3 were held for further action and 1 was withdrawn. Presently there are being processed 27 applications.

This marks the close of our first year with the services of an Executive Secretary. In my opinion, there has been a splendid coordination between the work of the Executive Secretary and that of the Secretary and other offices, which proves the value and wisdom of this arrangement.

I should like to say a brief word of praise for Miss Blanche Dahinden, who has very efficiently served our Association.

In closing, let me publicly thank each one of you for your cooperation.

PRESIDENT DODD: I want to present to you our Executive Secretary, Blanche Dahinden, who has truly done a remarkable job, who is responsible for the very smoothly working operation that we have had during the year, and, very largely, for this convention.

Now, I don't know whether she has anything to report or not, but at least I want you to see her, to meet her, and to greet her as cordially as she deserves. (Applause.)

Report of The Executive Secretary

MISS BLANCHE DAHINDEN
Milwaukee, Wisconsin

IT has been a year since I was introduced to you at Coronado, a year which has gone quickly and happily for me. When I found my name on the program I was a little bit concerned and I asked Mr. Dodd what I should talk about and he suggested that you might be interested in knowing a little bit about the operation of my office, so I will try to tell you something about it.

There were two large jobs that were accomplished this year. One was the actual removal of the office to its new quarters, which involved looking for new furniture, new equipment, and planning the space which was available, and the actual removal of the office which took place back in November.

The other big job was transferring the back issues of the Journal from Mr. Yancey's office where they had been stored for many years to Milwaukee. This involved planning space for these Journals. So I found a big basement room in a building around the corner from the office and had it painted and shelves built, went to Mr. Yancey's office, packed up the Journals and mailed them, shipped them. They came in 50 cartons about this big (demonstrating) and the railway express men just heaved them through a front window and there I sat in a great big jumbled-up pile and I went over several times full of ambition and looked at them and just turned around and went out and locked the door (laughter), and they would probably still be there if the Editor hadn't heckled me for an inventory, and the further fact that every time a member ordered a back issue and I went over to look for it, it was always at the bottom of the pile. So I finally took the bull by the horns and unpacked them and sorted them and counted them, and now the room is a joy to look at.

There are certain jobs which take their orderly place in the course of a year and I think a good place to start to tell you about my work would be when I return from one of these meetings. There are always a lot of tail ends to be tied up at the end of a convention, and then the minutes of these various committee meetings must be transcribed from my notes and sent to the various committees for their approval.

Thereafter, gentlemen, comes my vacation—I am just throwing this in so if any of you write to me between August 4th and 18th and you don't get a prompt reply you will know that I am gone, the door has been locked and there is nobody there—and if you want to know where I am going, I am going up North, into the north woods of Wisconsin, to my aunt's cabin and I am just going to flop and rest and swim and row a boat and play canasta and scrabble and drink beer for two weeks. (Laughter and applause.)

SECRETARY O'KELLEY: You are going to be worn out when you get back!

MISS DAHINDEN: And gain five pounds in the process. As you know everybody in Wisconsin drinks beer, not only on his vacation, but all the time. (Laughter.)

Then when I return on September 1st there will be the Journal subscribers to be billed—I don't know whether you are aware of the fact that we have Journal

subscribers. Of course you, as members, receive the Journal as part of your membership, but we also have approximately 200 subscribers, most of whom are branch claims managers of insurance companies, men who are not eligible for membership but who are entitled and permitted to subscribe to this Journal. These subscriptions may begin with any one of the four issues of the Journal so that this billing process takes place four times a year, as does also the addressing of the Journal envelopes. They are run off on the Addressograph in my office and then shipped to the printer of the Journal in Birmingham and he fills the envelopes and attends to the mailing.

About October 1st I get to work on the membership dues bills which go out to all of you on November 1st, after which the money starts flowing in, all of which must be deposited and certain records marked to indicate that the dues have been paid.

Then in November the preliminary notice of next year's convention goes out, with the forms for you fill to make your reservations and indicate to my office that you are going. Whereupon more money flows in, all of which must be deposited and records marked accordingly.

In December there are the details of the Mid-Winter Meeting of the Executive Committee to prepare. This meeting usually takes place toward the end of January or early February and after I return from that meeting there are more minutes to be mimeographed and sent out to the Executive Committee for approval.

Then in April I get into the work of the convention, which builds up to a peak around June 15th, when the badges are made and the registration cards are typed up and the trunks are packed and I am finally off to another convention—which just about rounds out my year.

In the meantime, along with these jobs, there is the usual daily mail to attend to, applications to codify, and so forth. I don't know if you realize what goes into the processing of an application. So many of the new members, and the nominators of new members, inquire occasionally why it takes so long to process an application. I suppose in the beginning of this Association a man merely indicated his intention of joining and the red carpet was out and he was in. Probably that was all there was to it. But now it takes from 60 to 90 days. The Membership Committee in the state in which the applicant resides is sent a questionnaire, which they must fill out and return, regarding the applicant's qualifications, and the insurance company clients listed on the applicant's blank are contacted to determine the scope of his representation of them. Some of these people answer promptly and some of them are laggard and require two or three letters. So this all delays the rate of progress, and finally when this information is all assembled in my office it is compiled into an information sheet which is sent out to the Executive Committee members for balloting, and when the votes are all in the results are sent to the Secretary who in turn sends the applicant a letter of admission announcing that he has become a member of the Association. So you see why it takes a long time, so don't get impatient.

Just for my own information, in case you are under the impression now that the job of the Executive Secretary is all roses, just for my own information I kept track here of the number of pieces of mail that went out from my office. It seemed to me I was doing an awful lot of typing of one sort or another and carrying a lot of mail to the post office and so I decided beginning last October 1st that I would keep track of it and see what went out, and I was amazed when I tallied up the figures last week to find that the number of pieces of mail which went out was 12,500. So Mr. Pledger can understand why there are always so many items of postage on my monthly statements.

I have enjoyed my work very much and I am indeed grateful that I was selected for the job last year. It is not only a pleasant way indeed in which to earn a living but it has enhanced my personal life considerably. I have a larger apartment in a nicer neighborhood. I have a new refrigerator. I have a television set. (Laughter.) My prestige among my friends has increased immeasurably. (Laughter.) They seem to be under the impression that if you have achieved the title of executive secretary you have reached the pinnacle of success.

In conclusion I would like to say that I can't imagine a better president on whom to cut my eye teeth than Mr. Dodd. He

has been kindness and patience personified during this year. He has left me strictly alone to run the office as I saw fit believing, no doubt, that any mistakes which I might make or difficulties into which I might get myself would be my own mistakes and difficulties to be wiggled out of to the best of my ability, all to come under the heading of experience, which it certainly has been.

And, of course, next year we will have as president Mr. Kluwin, who is an old friend and one of my favorite people, and he will be right there in the same building with me, where I can keep my eye on him at all times (laughter), and see that he has the best interests of the Association at heart, and if as a result of this his law practice must suffer, you may be sure that I will be the one to see to it that it does suffer. (Laughter.) Thank you. (Applause.)

PRESIDENT DODD: Thank you, Blanche. And I know she is not exaggerating when she talks about 12,500 pieces of mail going out, because I got 12,000 of them. (Laughter.)

Report of Treasurer

CHARLES E. PLEDGER, JR.
Washington, D. C.

THE Association presented a healthy financial picture for the fiscal year ended October 31, 1955. During that period, we operated conservatively and well within the budget set up by the Finance Committee. Our income for the twelve months exceeded our expenses by approximately nine thousand dollars. This excess of receipts over disbursements gave us the necessary cushion with which to meet financially the added expenses anticipated in the setting up and operating of the office of the Executive Secretary and to defray the cost of other items contemplated to make our Association of greater value to its members and more useful in the insurance field.

The current finances of the Association are in excellent shape, as shown by the attached Treasurer's report for the period November 1, 1955, to June 30, 1956, presenting balances as of the latter date and containing totals for eight months of the present fiscal year.

The office of the Executive Secretary is functioning smoothly and efficiently under the capable direction of Miss Blanche Dahinden. I pause to pay my respects to her for the intelligent performance of her duties and to express my thanks for the cooperation accorded me and the office of the Treasurer during the past year.

The function of the billing of membership dues and Journal subscriptions and the collection thereof was placed in the office of the Executive Secretary for the fiscal year which began November 1, 1955. This change was made without a hitch and has worked in an entirely satisfactory manner.

I now propose and have recommended to the Executive Committee that the detail work of the Treasurer's office be transferred to the Executive Secretary's office. This would mean that all the Association's books and records of a financial nature would be kept and maintained in the office of the Executive Secretary. Generally speaking, the Treasurer's duties then would not involve any detail work but would comprise only the signing of checks on the Association's main account and acting in a policy-making capacity as regards the finances of the Association. My recommendation contemplates that this change or transfer of duties be effective as of the end of the present fiscal year or as soon after October 31, 1956 as will allow for an audit of the books of the Association by an auditor designated by the Executive Committee*

It is my considered opinion that the efficiency of the detail operations of the Association will be improved both economically and from the standpoint of contribution to our members and the industry we represent, if they are centered and function from one place which, under our present set up, would be the office of the Executive Secretary.

I again express my appreciation for the

*The foregoing recommendation was approved by the Executive Committee at its meeting of July 11, 1956, at the Greenbrier.

privilege which I have had to serve you. I know of no finer organization. The cooperation accorded me has been excellent. I have enjoyed this year under the superb guidance of "Les" Dodd and it was a genuine pleasure to work with the other officers, the Executive Committee and members of the Association. I thank you.

REPORT FROM NOVEMBER 1, 1955 TO JUNE 30, 1956

Balance as at October 31, 1955:			
CASH:			
Checking Accounts:			
National Metropolitan Bank, Washington, D. C.		$13,616.93	
Marine National Exchange Bank, Milwaukee, Wisc.		1,995.00	
Marshall & Ilsley Bank, Milwaukee, Wisc.		1,000.00	
Savings Accounts:			
National Savings & Trust, Washington, D. C.		10,159.99	
Second National Bank, Washington, D. C.		10,000.00	
INVESTMENTS:			
United States Savings Bonds: Series K			
V-26258-K—Maturing Feb., 1966	$ 5,000.00		
V-26952-K—Maturing Feb., 1967	$ 5,000.00		
V-26953-K—Maturing Feb., 1967	5,000.00	15,000.00	$51,771.92
RECEIPTS:			
Dues, 1956	36,700.00		
Convention Registration Fees	8,444.75		
Journal	4,717.49		
Application Fees	2,200.00		
Interest:			
Deposit, Nat'l Savings & Trust	$307.74		
Deposit, Second Nat'l Bank	100.00		
U. S. Savings Bonds	207.00	614.74	
Miscellaneous	17.55	52,694.53	
DISBURSEMENTS:			
President's Office Expense	265.21		
Treasurer's Office Expense	974.32		
Executive Secretary's Office Expense	9,951.37		
Journal Expense	14,657.60		
Application Refunds	390.00		
Dues Refund	25.00		
Convention Expense	1,094.37		
Mid-Winter Meeting Expense	6,698.65		
Auditing Expense	150.00		
Miscellaneous	491.25	34,697.77	
Excess of receipts over expenditures			17,996.76
Balance as at June 30, 1956			$69,768.68
Accounted for as follows:			
CASH:			
Checking Accounts:			
Marine Nat'l Exchange Bank, Milwaukee, Wisc.			$24,756.20
First Wisconsin Nat'l Bank, Milwaukee, Wisc.			8,444.75
Marshall & Ilsley Bank, Milwaukee, Wisc.			$1,000.00
Savings Accounts:			
National Savings & Trust, Washington, D. C.			10,467.73
Second Nat'l Bank, Washington, D. C.			10,100.00
INVESTMENTS:			
United States Savings Bonds: Series K			
V-26258-K—Maturing Feb., 1966		$ 5,000.00	
V-29952-K—Maturing Feb., 1967		5,000.00	
V-29953-K—Maturing Feb., 1967		5,000.00	15,000.00
			$69,768.68

Report of the Editor

WILLIAM E. KNEPPER
Columbus, Ohio

TRADITIONALLY, the Report of the Editor is brief, as it should be, because the Journal speaks for itself.

As I complete my first year as your Editor, I do want to express my personal appreciation to the Regional and State Editors and to the chairmen and vice chairmen of the standing committees of the Association for their splendid cooperation. Through their efforts the Journal has been able to publish some exceptionally fine articles this year. To all who have written articles, the same gratitude is expressed.

Our new venture, Binders for the Journal, has met with substantial approval. To date we have received orders for 808 binders for back issues, and 209 standing orders for binders for future issues are in hand. Altogether, 380 members and subscribers have ordered binders. This venture has imposed considerable extra work on our efficient Executive Secretary, Miss Blanche Dahinden, for which she has our sincere thanks.

And now, Mr. President, following the custom established by our Editor Emeritus, George W. Yancey, it is a pleasure to present to you a complete set of bound volumes of the Journal. All but the last volume have been shipped to your office. This one I now hand to you in token of our grateful appreciation of your splendid service to this Association.

PRESIDENT DODD: Thank you very much. I thoroughly appreciate this and I assure you that it will occupy a prominent position in my own office and will be used.

Bill is pretty modest about his achievement, as I have already mentioned before, but I think we can truly be proud of our Journal in this Association. A great deal of credit for that, of course, is due to the fact that it was under the leadership and the editorship of George Yancey for so many years. For many, many years, until very recently, it was George Yancey's Journal. When it was turned over to Bill Knepper he realized that he had a tremendous pair of shoes to attempt to fill. He has done so to the extent that I know George Yancey is just as proud of the Journal today as he was during the many years that he labored upon it almost single-handed.

I see George Yancey in the audience, and I would like for him to stand and have your recognition as the original Mr. Journal. George Yancey.

(Mr. Yancey stood and the audience applauded.)

PRESIDENT DODD: As you all know, the work of this Association is carried out very largely through its standing committees. Without them we could accomplish little. If we have had a good year, it has been largely because your committees have done their work. We established a rule two or three years ago, not too strictly adhered to, that we would excuse any committee from filing a formal report of its activities provided it furnished at least two, and preferably three, substantial articles within the scope of its committee activities, for publication in the Journal.

This year I believe practically all the committees have furnished anywhere from two to four good, substantial articles in their field, and in addition most of them have also filed additional informative reports which will likewise appear in the Journal.

I just want you to see and to recognize those of the committee chairmen who are here.

(President Dodd then introduced the committee chairmen.)

(Editor's Note: The address of the Honorable Shackleford Miller, Jr., will appear in the October issue of the Journal.)

PRESIDENT DODD: At this point I will recognize our President-Elect, John Kluwin, for the purpose of proposing an amendment to the By-Laws of this Association. John.

Amendments To By-Laws

Presented by JOHN A. KLUWIN
Milwaukee, Wisconsin

Mr. President, members and guests: In keeping with the traditions of this Association in which we are so deeply steeped, it is now necessary that we again amend the By-Laws of the Association.

It has been brought to the attention of the Executive Committee that many of these committees have worked so hard and yet they are like the story of the mule, they are of doubtful paternity and with no hope of posterity. Therefore we felt that an amendment of the By-Laws was necessary in order to give proper recognition to their efforts.

Since we have arrived here it has been found necessary to make a further proposed amendment to that By-Law as published in the April issue of the Journal.

So, with your indulgence, Mr. President and members, I will read the proposed amendment as I propose that it be further amended:

Section 1. The following committees shall be appointed annually by the President, each to consist of not less than five members to serve for the year ensuing and until their respective successors shall be appointed:

Accident and Health Insurance
Automobile Insurance
Aviation Insurance
Casualty Insurance

and now a further amendment:

Federal Rules of Civil Procedure
Fidelity and Surety Insurance
Financial Responsibility

and a further amendment to delete the word "insurance";

Fire and Inland Marine Insurance
Life Insurance
Malpractice Insurance
Marine Insurance
Practice and Procedure
Workmen's Compensation and Unemployment Insurance
Finance
Home Office Counsel
Industry Cooperation
Memorial

and such other Administrative, Convention and Special Committees as the Executive Committee may authorize or as the President may deem useful, to serve for one year ensuing and until their successors shall be appointed.

Section 2. The duties of the first thirteen—It was printed "twelve" standing committees above mentioned shall be to study the present status of Federal and State Laws—

and adding "and rules of court":

and rules of court, changes or proposed changes therein and court decisions pertaining to that branch of Insurance designated in the name of the Committee, report the same to the Association and, when occasion requires, recommend such action by the Association as may be deemed proper.

Section 3. The duties of all other committees shall be as prescribed by the Executive Committee or the President.

Mr. President, I move the adoption of that amendment as amended.

PRESIDENT DODD: Is there support?

MR. JOSH H. GROCE: I second the motion.

PRESIDENT DODD: All those in favor of the motion to amend the By-Laws as read, please indicate by saying "aye"; opposed? Being none, the motion is carried and the amendment is adopted. Thank you, Mr. Kluwin. Do you have one more?

MR. KLUWIN: I also move for the amendment to Section 3 of Article V to read:

That in Section 3 of Article V the words "certified or" be inserted immediately preceding the words "registered mail".

Now, the purpose of that is in keeping with our distinguished speaker's remarks this morning, that things change in Washington so rapidly, therefore they have given us a saving that we can send out certain mail that now is required to be registered, we can send it cheaper by certified mail, but having in mind that the department might change that some Monday morning, we ask that it read "certified or registered," and I now move the adoption of that amendment.

PRESIDENT DODD: Is there support?

MR. GROCE: I second the motion.

PRESIDENT DODD: All those in favor of the motion to so adopt, to so amend, please indicate by saying "aye"; opposed? The motion is carried and the amendment is adopted. Thank you, John.

A few moments ago when I introduced the chairmen of the standing committees of this Association I overlooked the introduction of one gentleman who, although not a chairman of a standing committee, was, so to speak, the chairman of a special committee that did a very arduous and delicate job for this Association in the past year with a great deal of sacrifice of time and energy, and that had to do with the action taken by the Association and its Executive Committee in opposition to the proposed amendment of certain of the Federal Rules for Civil Procedure.

I think all of you received a copy of the brief that was filed in connection with that question. The amount of mail that I had, as President of this Association, commending the action of the Association in taking the position that it did—which resulted successfully—was tremendous. The man who was chiefly responsible for doing that job on behalf of the Association is Mr. Josh H. Groce, of San Antonio, Texas, and I would like to have him stand so that you may recognize him and express your appreciation.

(Mr. Groce stood and the audience applauded.)

PRESIDENT DODD: Now, is Mr. Wilson Anderson in the room?

I will ask him to make such announcements as he deems necessary with respect to the entertainment features of this convention, in respect to which he and his committee have done a magnificent job, as you will learn later through this convention. Wilson.

MR. ANDERSON: Thank you, President Dodd.

Ladies and gentlemen of the convention: Will Rogers belonged to that now extinct group of Americans who drank their coffee out of the saucer. On one occasion when a guest arrived at his home, he passed the coffee to him and said, "Have my coffee. It is already saucered and blowed." (Laughter.)

Your entertainment has already been saucered and blowed and is ready for you to enjoy it. We feel that we do have some very interesting entertainment lined up for you, as set forth in the program which you have.

PRESIDENT DODD: Thank you, Wilson. We are glad that everything is blowed.

* * *

We come now to the item of business that I think any past president of this Association will agree is one of the most difficult jobs that the President is confronted with, namely that of the selection of a nominating committee.

I assure you that I have given it prayerful consideration in an effort to see that all elements of this Association are represented, that geographically it is acceptable, and that there is the proper division between practicing lawyers and home office people, and so forth—all of the other considerations that are necessary to go into that selection.

The chairman of that committee will be a gentleman to whom I have already referred and have established to you, I think, his absolute impartiality and versatility, J. A. Gooch, of Fort Worth, Texas.

Other members of that committee: Mr. G. Arthur Blanchet, of New York; Frank X. Cull, of Cleveland, Ohio; Gordon H. Snow, of Los Angeles, California; J. Mearl Sweitzer, of Wausau, Wisconsin.

(After an announcement by the chairman of the nominating committee, the general session of the convention was recessed until 9:00 o'clock A.M. July 14, 1956.)

GENERAL SESSION

July 14, 1956

The meeting reconvened in the auditorium on Saturday morning, July 14, 1956, at 9:55 o'clock, President Dodd presiding.

PRESIDENT DODD: Ladies and gentlemen, I will call the meeting to order.

I would like to ask the Reverand Charles L. Draper, Vicar of St. Thomas' Episcopal Church of White Sulpher Springs, to open this meeting with an Invocation. Reverend Draper.

THE REVEREND CHARLES L. DRAPER: Let us pray.

Almighty God, send the spirit of Thy wisdom unto Thy people and grant that they may receive Thy manifold gifts. May they temper knowledge with understanding and so abide in Thy truth that they may always receive Thy blessing, through Jesus Christ our Lord. Amen.

PRESIDENT DODD: Thank you, Reverend Draper.

(Editor's Note: Here followed the presentation of bridge, canasta and golf prizes.)

PRESIDENT DODD: You know perhaps I am prejudiced, but I think this has been a pretty good meeting. I have had a great many people in attendance at this Convention who have been kind enough to come to me and say complimentary things about the program, and so on, and I just want you to know that if you agree with that sentiment, if you have had a good time, it is not because I have had anything to do with it. I claim credit for having done just one thing: to have been wise enough, perhaps lucky enough, to have been able to select committees that have done a tremendous job, and before we get away from here I want to express to Wilson Anderson, Chairman of the General Entertainment Committee, my very great appreciation for what he has done to make this meeting successful, and that goes for the chairmen of all the other special events, the Convention Program Committee and all who have had a part in this meeting.

If you have enjoyed it, if you agree that it is a good convention, I should like you to show your appreciation of the work of those splendid people.

[Loud and prolonged applause]

PRESIDENT DODD: It is so ordered without dissent.

Is Bill Baylor in the room?

[Mr. Baylor rose.]

PRESIDENT DODD: I am going to ask him to come forward at this time and present the report of the Memorial Committee. Bill Baylor!

Report of The Memorial Committee, 1956

F. B. BAYLOR, *Chairman*
Lincoln, Nebraska

AT a time when, throughout the world, a conflict of ideologies has created doubt and uncertainty, we turn to those by whose philosophy, acts and deeds such doubts and uncertainties are extinguished.

Within the year since last we met in general assembly, the work of valued members of this Association has been completed. Daily they proclaimed the American Way and lived by a creed which, in the words of Joel D. Smith, gives the confirmation and assurance which we seek.

"To start wherever I chance to be,
With an open road and a foot that's free:
To follow through to a chosen goal,
With independence and strength of soul:
To lend a hand to the needy earth,
And ask no more than its work is worth:
To dream and try, aspire and pray—
That's what I call the American Way.

"To play my role with a heart that sings,
To know the richness of simple things:
To feel I've paid for what I've won,
In the honest coinage of duty done;

To seek the weal of our brotherhood,
And share in the larger common good;
To keep the faith with my race and day—
That's what I call the American Way.

"To earn my portion, to spend and give,
To believe in God—find it good to live—
To have good neighbors—and be one, too,
To be a patriot all through and through;
To mingle moments of work and rest,
To love my family and fireside best;
To do my thinking, and have my say—
That's what I call the American Way!"

As we stand, we review the names of those whom we honor and whose passing we accept in sorrow.

George W. Atmore, Duluth, Minnesota
Harold G. Baker, East St. Louis, Illinois
James S. Benn, Jr., Philadelphia, Pennsylvania
William B. Campbell, Wilmington, North Carolina
Walter B. Carroll, Camden, New Jersey
Joseph S. Conwell, Philadelphia, Pennsylvania
John G. Feinour, Harrisburg, Pennsylvania
Robert Guinther, Akron, Ohio
Harold F. Hecker, St. Louis, Missouri
Lionel P. Kristeller, Newark, New Jersey
James M. O'Hara, Utica, New York
G. L. Reeves, Tampa, Florida
Frank P. Ryan, Worcester, Massachusetts
Alton W. Teale, Suffern, New York
Adelbert W. Thomas, Cleveland, Ohio

Mr. President, we in silence have acknowledged the debt which we owe those whose names now, with regret, will be inscribed on the permanent scroll in recognition of that high regard which is accorded them and of those fundamental principles to which they have given vitality.

The Memorial Committee respectfully submits its report.

F. B. Baylor, *Chairman;* Oscar J. Brown, *Vice-Chairman;* Milo H. Crawford, Pat H. Eager, Jr., Gerald P. Hayes, Walter R. Mayne, George W. Yancey, Stanley C. Morris, *Ex-Officio.*

(Editor's Note: The address of the Honorable G. A. Gale will appear in the October issue of the Journal.)

Report of Nominating Committee

J. A. Gooch, *Chairman*
Fort Worth, Texas

Ladies and gentlemen, as you know, the Nominating Committee was composed of Gordon Snow, of California; Frank Cull, of Ohio; Arthur Blanchet, of New York; and Mearl Sweitzer, of Wisconsin; and myself.

It is the report of that committee that I shall now read to you:

For Treasurer, Charles E. Pledger, of Washington, D. C.

For Secretary, Frank O'Kelley, of Tallahassee, Florida.

For one of the Vice Presidents, James P. Allen, of Boston, Massachusetts.

The other Vice President, F. Carter Johnson, Jr., of New Orleans, Louisiana.

For three members of the Executive Committee for three years: L. J. (Pat) Carey, of Detroit, Michigan; Lewis C. Ryan, of Syracuse, New York; Payne Karr, of Seattle, Washington.

For President-Elect, Forrest A. Betts, of Los Angeles, California.

Mr. Chairman, I move the adoption of the report of this committee. [Applause]

PRESIDENT DODD: Thank you, Mr. Gooch, for a job well done. I will entertain a—perhaps before entertaining any motion I should ask, are there any other nominations to be made from the floor? (There were none)

MR. GROCE: I move that the nominations be closed.

PRESIDENT DODD: And I assume that carries with it the direction to the Secretary to cast a unanimous ballot for those placed in nomination. Is there support for that motion?

MR ROGER LACOSTE: I second the motion.

PRESIDENT DODD: Moved and supported. All those in favor of that motion

will please say "aye"; opposed? The motion is carried and the nominees whose names you have just heard are declared elected.

Will those nominees, with your officers and members of the Executive Committee who are here—and I hope you are all here—please come forward so that we may have the traditional look at you.

I hope that you will find no strangers among them. I am sure that you all know all of them—a splendid-looking group. An announcement will be made a little later of the first meeting of your Committee. I present and welcome all of you. I think the Committee has chosen wisely and well. Thank you. (Applause)

And now comes one of the pleasant duties of the retiring president, that of the induction of his successor.

I would like to ask Mr. Pledger, if he will, to see if he can find Mrs. Dodd and bring her up here.

I would like Mr. O'Kelley to locate Noreta Kluwin and bring her up here; and also please bring Mrs. Betts up here.

You know, many of us who have been presidents of this organization, wouldn't have made it except for our wives.

I want to present to you my own dear wife, next to her, Noreta Kluwin, the wife of the President-Elect and incoming President; and next to her, Mrs. Betts, the wife of our new President-Elect. (Applause)

Now, is Gerry Hayes in the room? I would like to ask you and Oscar Brown to escort to the rostrum John Kluwin.

MR. OSCAR J. BROWN: Mr. President, the incoming President, John Kluwin! (Applause)

PRESIDENT DODD: I can say in all sincerity that if a year ago I had been the sole member of the Nominating Committee and I had been invested with the arbitrary power to choose my successor, I would have selected none other than John Kluwin, a man who over a period of years has done much for this Association.

John, it is my very great pleasure to turn over to you this slightly battered and used gavel, which is symbolic only, because upon good behavior I can assure you that you will get a bright, shiny new one next year. So I do this symbolically, as an emblem. I turn it over to you with my warm personal regards, with my affectionate friendship, my pledge of support, and I can assure all of our members that the affairs of this Association are in good hands.

(President Dodd handed the gavel to President-Elect Kluwin and they shook hands.)

PAST PRESIDENT DODD: Thank you. I have enjoyed it myself, and I retire with the great assurance that the affairs of the Association are in better hands than ever. (Applause)

PRESIDENT KLUWIN: Mr. Dodd, friends: I had to close my ears to the remarks of Lester Dodd for my own emotion would not permit me to go on. I shall enjoy reading those remarks in the years to come.

I would like to conclude with only seven words—but I won't (Laughter), I am proud to be your President.

It has been said that the assets of a country, its great natural resources, are its men and women. Bearing that in mind, I know that we have the greatest assets on the North American continent in the members from Canada and from the United States. Counting noses, however, last night and again this morning, I fear this morning that some of our assets are frozen. (Laughter)

I suppose no one came to this office with a greater background of training than I have had. It has been my experience to be tutored by none other than Judge Grubb, Dunc Lloyd, Wayne Stichter, Joe Spray, Al Christovich, Tiny Gooch, Stanley Morris and Lester Dodd, a faculty that is unexcelled.

I am reminded of the story of the penitent who went to confession. After he had disclosed his sins, the padre remarked, "I am sorry, but I can't give you absolution."

And the penitent countered, he said, "You are a queer priest. You can't sing, you can't preach, and now you can't give absolution."

Well, I can only say, I can't sing, I refuse to preach, and I sincerely hope that at the conclusion of the next convention you can give me absolution.

Maybe you wonder why I was seated so close to the rostrum. The truth of the matter is, it wasn't all hospitality that I was extending to our guest speaker this morning. I was looking for the possiblity of future favors. There have been considerable disparaging remarks made about my physical disabilities and as I heard our speaker this morning I looked forward with the happy thought that if I am thrown out here perhaps I can become a puisne judge in the Court of Exchequer. [Laughter]

We have in the By-Laws of this Association a by-law which does not permit us to make or give or offer a resolution in compliment of any officer. However, it does not prevent me from saying to you on behalf of each one of you that we are deeply indebted to the great work that Lester Dodd has done through the years and particularly during the past year, and I think that we will all leave here today or tomorrow with the firm conviction that this has been on of the outstanding conventions of all time. I am sure that you share in that view with me. [Applause]

Before concluding I wish to announce that the new Executive Committee will meet in the Greenbrier Suite on the second floor as close to two o'clock as we can, so that we can expedite matters and you can get on your way to other entertainment as soon as possible.

Is there any further business to bring befor this convention? [There was none.] If not, it stands adjourned.

OPEN FORUM

EVALUATION OF A PERSONAL INJURY CASE FOR SETTLEMENT PURPOSES

RICHARD B. MONTGOMERY, *Chairman*
New Orleans, Louisiana

G. CAMERON BUCHANAN, *Vice Chairman*
Detroit, Michigan

PARTICIPANTS:

JUDGE— Honorable J. Skelly Wright, United States District Judge, New Orleans Louisiana.

PLAINTIFF'S COUNSEL—S. Burns Weston, Cleveland, Ohio.

DEFENDANT'S COUNSEL—Thomas M. Phillips, Houston, Texas.

HOME OFFICE COUNSEL—Gordon H. Snow, Los Angeles, California.

CHAIRMAN MONTGOMERY: Ladies and Gentlemen: No chairman has ever had a vice chairman who cooperated with him more, did more work, put out more effort, than the vice chairman of this committee, Mr. G. Cameron Buchanan, so I am going to ask him to please open the meeting this morning to show our appreciation for all he has done in setting up this Open Forum. Mr. Buchanan.

MR. BUCHANAN: Good morning, gentlemen. It is kind of Dick to say those words because a vice chairman usually is in the same position as a past president—none of them are here this morning because it is a little too early, so I can say that.

I think we have this morning a particularly interesting program to all of you and we certainly are fortunate in having for our speakers men with excellent talent.

I thought perhaps that I should explain to you, just somewhat, our mechanics of procedure so that you will follow what we intend to portray.

Our opening speaker is the Honorable J. Skelly Wright, of the United States District Court of New Orleans. He is going to talk with us on the importance and necessity of settlement and evaluation of personal injury cases.

Judge Wright, prior to being on the Bench, after service in the Navy, was in the District Attorney's office, and was U. S. District Attorney for the Eastern District, and practiced law.

Following Judge Wright on the program is S. Burns Weston—and in case the Lynchburg press should happen to find this, I will tell them that he is with the firm of McConnell, Blackmore, Cory, Burk & Kundtz. The fact that his name doesn't appear in the firm indicates that he is the one who does all the work.

In attempting to find this gentleman's place on our speakers' program, I can tell you that Dick Montgomery and I wrote 1,613 letters to members of the Association trying to find a member who had handled a plaintiff's case [laughter], and we were totally unsuccessful. I then went to Burns and said, "There is no member of the Association who has ever handled a plaintiff's case, and will you let on you did?" and that is what he is going to do for us.

Of course, as to defendant's counsel, that was easy. That is what we all are, and so I had to find one who was modest enough to come and tell all of you experts how to do this, and in that regard we found Tom Phillips, of Houston, Texas, again the working member of the firm—his name doesn't appear in it—Baker, Botts, Andrews & Shepherd.

All of these home office men are retiring individuals, as you know, and it was almost equally difficult to find a home office man as it was a plantiff's lawyer in this group. We needed one with that stature who carries the money in his brief case when he comes to town, so we found a gentleman with the title of vice president as well as general counsel and we have Gordon H. Snow, of Pacific Indemnity, of Los Angeles.

Now, here is what we propose to do. For those who came early, you have read a set of facts. Following the judge's opening speech on the importance of settlement and the evaluation of settlement cases, we are then going to hear from Burns Weston, and I wish that you would appreciate this, that up until this moment none of these gentlemen has seen each other's paper; none of them is familiar with each other's evaluation; and when you hear the value placed upon these cases, each of these men is likewise going to hear the other's evaluation for the first time. Each of them will give you his evaluation and his manner of evaluation in this case, and then, as though they had no real discussion or no information as to what it is, after we have heard from each one of them, you are going to find this position; that the man with the fat brief case has arrived in town on the trial day, and Plaintiff's Counsel, Defendant's Counsel and this good Vice President and General Counsel from Los Angeles, are going to go over to Court and, like all judges do, particularly those with long-handled blackjacks, Judge Wright is going to take them into his office and there, gentlemen, you are going to see how to do, or how not to do, or what we all would like to do, in the settlement of the case rather than go to trial.

I might say that this is not an actual case. The facts are similar to the true facts of an actual case, with important changes, the injuries are like the injuries sustained by the man who is described.

I trust that I have explained to you that each of these preliminary statements is in the nature of a prologue with the final culmination of all of them going to court.

Dick has just suggested that you must imagine that up here at the lectern is first one and then the other and none of the others is present and that these men are not in the presence of each other until we get over into Judge Wright's court.

Statement of Facts

Daniel Roberts, age 27, an excellent appearing young man with a seventh grade education, after serving an apprenticeship, became a skilled machinist with an earning capacity of $170 per week. He is married with three children, ages two, three and seven.

Roberts' employer, Machine Repair, Inc., a contractor had a written contract with the All American Motors Company for maintenance of factory equipment and machinery. The manufacturer gave the contractor an oral authorization supplemented by a written purchase order at a later date to dismantle a press. The manufacturer before turning over the press removed the

dies. With the removal of the dies, the die-setter informed the contractor foreman that he could take over the press. The contractor's foreman misinterpreting the statement, thought the press was ready for dismantling, instructed the plaintiff to commence dismantling. The manufacturer and contractor each claim that it was the duty of the other to cut off the air and electricity. The electrical power and air pressure were not turned off the press. Roberts heard the manufacturer's die-setter tell his foreman that he could have the press, and therefore went to work without inspecting the press. As the dismantling proceeded the air pressure forced the ram on the press upward striking the employee of the contractor, Roberts, and throwing him from the press.

Roberts sustained multiple fractures of the lower left leg and foot; traumatic amputation of the right leg above the ankle and a fracture of the left humerous resulting in an un-united fracture. A complete medical resume follows this Statement of Facts.

Roberts now wears an artificial limb, a brace to his knee on the other leg and a brace from his shoulder to his finger-tips on the arm.

The contractor's compensation carrier has paid $5000 in Workmen's Compensation and $5000 in medical expense.

The Compensation Law permits the employee to bring his action against the third party with the compensation carrier being entitled to reimbursement out of the proceeds of any settlement or judgment.

Roberts has brought an action against the All American Motors Company in the United States District Court.

In the Agreement of the manufacturer and contractor is an Indemnity Agreement reading as folows:

"ARTICLE VII—INSURANCE

"Second Party hereby asumes all risk of damage or injury from any cause to property used or persons employed on or in connection with the work (including property and employees of Second Party, First Party and all third parties) and of all damage or injury to any persons or property wherever located, resulting from any action or operation under this agreement or in connection with the Work or extra Work, and undertakes and promises to protect and defend First Party and hold it harmless, against all claims and suits on account of any such damage or injury. Previous to starting work, Second Party shall procure and maintain for his own benefit the following insurance protection:—• • • •

"(b) Public Liability Insurance with personal injury limits of $100/300,000 and including a property damage limit of— • • • •

"ARTICLE XV

"It is hereby agreed that Second Party assumes:

"(1) All risk, from any cause, of damage or injury to property or persons used or employed on or in connection with the work.

"(2) All liability for injury or damage to persons or property including First Party's employees and property wherever located resulting from any action or operation under this agreement or in connection with the work covered by this order, including any extras, and Second Party undertakes and promises to protect First Party against all claims and suits by third persons on account of any such damage or injury.

"The provisions of this paragraph shall supercede all other provisions of any agreement between the parties which may be construed to be inconsistent herewith."[1]

The manufacturer has asked the contractor to indemnify it and hold harmless, both under the contract and under the RYAN STEVEDORING decision.[2]

Plaintiff, Roberts, contends that the manufacturer was guilty of negligence in authorizing the dismantling of the press without the electricity and air being shut off.

Roberts further contends, as does the contractor, that by the statement of the die-setter they were led to believe that the press was ready for dismantling.

[1]See XXII Insurance Counsel Journal, page 400.
[2]See XXIII Insurance Counsel Journal, page 170.

Medical Resume

Mr. Roberts, as you know, has been under our care since the date of his injury, February 13, 1952, at which time he gave the history that as he was dismantling a large press he was thrown about fifteen feet through the air. He suffered severe trauma to both lower legs with a fracture of the right ulna. The original x-rays taken at Detroit Memorial Hospital were reported as follows:

Right hand and wrist: AP and lateral film studies of the right wrist and hand including only the lower third of the forearm shows evidence of transverse fractures thru both radius and ulna at the junction of their middle and distal thirds, with apparent satisfactory position of the fragments in the lateral view, although the fracture line is not visualized adequately in the AP view. There is no evidence of recent fracture elsewhere in the wrist or hand. There is an old well-healed oblique fracture of the shaft of the 4th metacarpal, without deformity. No other productive or destructive bone changes are demonstrated in the hand or wrist.

Both legs: AP and lateral film studies of the right leg and somewhat oblique study (AP) of the left leg show no evidence of recent or old fracture in the right tibia or fibula, and no productive or destructive bone change present. There is linear fracture thru the medial plateau of the upper left tibia, which appears to be in satisfactory position in this single projection. There are slight comminuted, transverse fractures of the lower thirds of the left tibia and fibula about 6 cm. above the ankle joint, with the fragments in excellent alignment. No productive or destructive bone change is demonstrated in the left leg.

Left foot: AP and lateral film studies of the left show severe crushing type of fractures of the os calcis with less extensive fractures of the talus and navicular bones, and extensive crushing fractures of all the metatarsis, most severe in the first. There is no marked deformity at any of the fracture sites, and there is no dislocation of any of the joints.

Right foot: AP and lateral film studies of the right foot show a severely comminuted fracture of the os calcis with marked flattening of the body and loss of the normaltuber angle. There is fracture of the navicular with a talonavicular dislocation. The distal tarsal bones being displaced superiorly. The remaining tarsal bones are not clearly delineated in those studies. There is a fracture of the head of the 5th metatarsal in essentially satisfactory position. No other fractures are demonstrated in the metatarsal bones, or in the phalanges.

Impressions: 1. Fractures of both bones of the right forearm at the junction of the lower and middle thirds in fairly satisfactory alignment although the position in the AP view is not delineated on the present studies, and repeat AP and lateral studies of the entire right forearm are recommended.

2. Old well-healed fracture of the shaft of the right 4th metacarpal in good position.

3. Negative study of the right leg.

4. Linear fracture of the medial plateau of the left tibia, in satisfactory position.

5. Fractures of the lower thirds of the left tibia and fibula in satisfactory position.

6. Severely comminuted crushing type fractures of multiple tarsal bones on the left, and of all of the left metacarpals, as described above. There is no associated dislocation.

7. Severely comminuted fracture with marked flattening and loss of the tubar angle of the right os calcis.

8. Complete superior dislocation of the navicular and other distal tarsal bones with relation to the os calcis, and talus, associated with fracture of at least the navicular and possibly of other tarsal bones, not well visualized on these studies.

9. Fracture of the head of the right 5th metatarsal in satisfactory position.

M. D.

There was extensive soft tissue trauma to both lower legs and it was felt, after cleaning the legs up thoroughly, that it would not be possible to obtain sufficient

circulation in the left leg; the prognosis in the right leg at that time was also guarded. Therefore, we did an amputation through the lower third of the left leg at the site of the fracture of the tibia and fibula. We later did an open reduction and put a plate on the left ulna. We changed the cast on the right leg several times as we wished to watch the circulation in this leg.

He remained in the hospital until June 24, 1952. Since that time he has been treated at the office. He appeared regularly for a long period of time, but recently he has been coming in only once or twice a month. We had considerable trouble in healing the stump of the amputated left leg. At this time, however, there is no infection and it has healed satisfactorily.

The right leg has also healed with deformity of the foot, as it was not possible to get the tarsal bones back in position and in view of the fact that they were powdered considerably, there was considerable bone which had gradually sloughed out. This also has stopped and the present condition is apparently stationary, leaving him with a relatively stiff tarsal region but one which he gets about on satisfactorily with his special shoes.

At the present time he is a well developed, well nourished, adult, twenty eight years of age, married, has two children, one age seven years and one nine months old, five feet nine inches in height and weighing 170 pounds.

Eyes, Nose and Ears: Normal.

Mouth: The pharynx is clear. The teeth are in good condition.

Heart: The heart borders and sounds are normal. There are no murmurs. The blood pressure is 120 systolic, 70 distolic. The pulse rate is 72.

Chest: The lung fields are clear throughout and recent x-rays of the chest showed no pathology.

Abdomen: The abdomen shows no masses or tenderness and no hernia.

Back: The back shows no abnormality. It is freely movable in all directions and the leg tests are negative.

Nervous System: The cranial nerves are intact. The reflexes are physiological. The Romberg Test is negative. He is well oriented as to time, place and position. There is no anaesthesia or paralysis.

Extremities: There is a scar over the right ulna, and while the fracture line has not completely disappeared, there is a large amount of excess callus and it is believed that this will eventually be a complete bony union.

The lower extremities show the deformity of the tarsal region of the right leg and he wears a special shoe. He still uses a T Brace, as he says that if he gets excess motion at the ankle he develops pain. There has also been, recently, some contracture of the extensor tendons at the toes, producing moderate clawtoes. The right foot is rigid, but considering the injury it is a functioning foot with a good result. There is no drainage. There is a scar on either side of the foot in the tarsal area.

The left leg shows an amputation at the junction of the lower and middle third, which at this time has healed. This is apparently not causing symptoms.

X-rays were taken: December 8, 1953: Report is as follows:

The re-examination of the left leg shows the amputation involving the tibia and fibula as previously described. No active osteomyelitis or recent periosteal proliferation is revealed. The appearance is essentially the same as at our last examination of 7-8-53. No definite sequestrum is evident and there is no loose particle of bone in the soft tissues. A compression fracture of the internal tuberosity of the tibia has healed with solid union with some depression of the articular surface.

The re-examination of the right foot shows extensive fractures involving the os calcis and the anterior portion of the astragalus and the anterior tarsal bones with the exception of the internal cuneiform. The general appearance is not significantly changed from that of our study of 7-8-53. There is a fairly marked degree of pes pianus and there is considerable disturbance in the subastragalar joint as well as the articulations of the anterior part of the tarsus.

Some irregular detached particles of bone are seen but these would not be important in the absence of localized infection. The anterior part of the right foot remains essentially normal. The right tibia

and fibula are intact and the ankle joint has a normal appearance.

The re-examination of the right forearm in three projections shows the fracture of the ulna near the junction of the middle and distal thirds as previously described. Internal fixation by a four-screw metal plate has been done and there is some absorption about the plate and screws which suggests that there is motion at the fracture site. The fracture line is for the most part plainly visible and there is considerable sclerosis and bony overgrowth which does not completely bridge the fracture. The roentgen appearance is that of non-bony union. There is no evident disturbance at the articulations of the right radius and ulna, the elbow or wrist.

CONCLUSIONS: Amputation which has caused loss of the distal portions of the shafts of the left tibia and fibula with the ankle and foot is essentially unchanged since our last examination. No definite sequestrum or active osteomyelitis is revealed. There is a minimal soft tissue pad over the end of the bone. Fracture involving the internal tuberosity of the left tibia at the knee has healed with solid union with some depression of the tibial plateau.

The extensive fracture of the tarsal region of the right foot which caused much irregularity of the os calcis, astragalus and most of the anterior tarsal bones has undergone complete healing with considerable loss of the planter arch and much disturbance in all of the articulations. No active disease is revealed.

The fracture of the right ulna has not united by bony union; the roentgen appearance is that of fibrous union. The fragments are still held in good position by the metal plate and four screws. No active disease is seen but there is some absorption about the plate and screws as from motion at the fracture site. M. D.

Chest: 12-16-53: The examination of the chest fluoroscopically and by stereoscopic postaroanterior views; also a lateral view shows the diaphragm normal. The costophrenic angles are clear. The heart and aorta are not enlarged. There is no upper mediasinal mass. There are no discretely enlarged hilar nodes, though some small dense shadows in the hila may represent a limited healed childhood infection. There are old completely healed rib fractures on the left side anteriorly. These are of no present clinical importance. There is no parenchymal tuberculosis. The lateral view shows the anterior and posterior mediastina clear and the sternum and thoracic spine are intact.

CONCLUSIONS: There is no evidence of pulmonary or circulatory disease of present clinical importance. An active tuberculous process could be ruled out. There is asymmetry of development of the first pair of ribs. There are old healed fractures on the left.

M. D.

Opinion

This case, with the multiple injuries, was somewhat difficult to handle and to evaluate what was best for the patient. He is getting along satisfactorily. There is no contraindication at this time to him doing certain forms of work. He will continue to require observation for several months. He will, of course, continually require braces and his prosthesis refitted from time to time. We are doubtful that any surgery will be necessary to the arm, as he will not be able to climb or do heavy work. He has learned very well how to take care of himself.

Questions For Discussion

What Is The Value of This Case From The Plaintiff's Point of View?

What Is The Value of This Case From The Defendant's Point of View?

What Is The Value of The Case From The Home Office Counsel's Point of View?

What Is The Value of The Case From The United States District Court Judge's Point of View?

Is The Manufacturer Entitled To Indemnity From The Contractor?

Opening Remarks

HON. J. SKELLY WRIGHT*
New Orleans, Louisiana

FROM time immemorial, lawyers and judges alike have received less than complete approbation from laymen. That, I may add, is an understatement. It will be remembered that Plato included no lawyers in his Utopia nor did St. Thomas More in his. In more recent times, our profession has been subjected to the unedifying spectacle in literature and less of the lawyer being depicted as a shyster, a mouthpiece for mobsters. Nor have judges escaped the calumny. In the cowboy operas which are shown on the TV to the delight of my very own eight-year-old son, judges are pictured as corrupt scoundrels. Only Hopalong Cassidy and Wild Bill Hickok, as the personification of all that is good, can right the wrongs perpetuated on defenseless widows and orphans who are mulcted out of their homesteads and inheritances by unscrupulous lawyers and other bandits.

Much of the criticism directed at our profession is, of course, utterly without foundation. On the other hand, we, as lawyers and judges, must recognize the validity of at least some of the criticism and admit our shortcomings. Perhaps the most valid criticism relates to the law's delay, its technicality and its cost. No one within the sound of my voice can with fairness say that much cannot and should not be done to expedite the disposition of cases, eliminate the technicality of the law and reduce its costs.

I am sure all of you are familiar with the magazine articles which are periodically printed showing that in certain metropolitan areas of our country, personal injury cases take from three to five years to be brought to trial; that when the breadwinner of the family is injured and unable to work, his family goes on relief, that thus, through the law's delay, economic duress is brought to bear on the personal injury litigant so that he is forced to settle his claim for a fraction of its true value. These articles show the utter inability of the layman to account for or to excuse the law's delay. If business men have a problem, they sit down at the conference table at the earliest opportunity and try to resolve the problem. They fail to see why some such direct method cannot, in some way, assist in eliminating the interminable delays of the law.

The answer to the problem of delay in the administration of justice is not an increase in judges, courthouses and all that goes with it. It must be remembered that the judicial process is a parasite on the economic process. The judicial process produces nothing but resolution, after some delay, of disputes arising out of the economic process, and there is a limit to the added burdens our economy can stand. Consequently, it behooves us all, judges and lawyers alike, to seek out a method of improving the judicial process by increasing its capacity as well as its efficiency. Unless we are successful in improving the administration of justice, prospective litigants will continue in increasing numbers, as they have in the past, to seek arbitration of their disputes rather than risk the delays seemingly inherent in the administration of justice.

Various proposals looking in the direction of eliminating or expediting litigation have been made and some have actually been put into practice. The June issue of the American Bar Association Journal describes for us the apparently successful experiment with compulsory arbitration now taking place in Pennsylvania. There, pursuant to a state statute, the court of common pleas in any county of the state may, by rules of court, decree that all civil cases, with some minor exceptions, where the amount in controversy is $1,000 or less, shall first be submitted to and heard by a board of three arbitrators who are members of the bar of the county. The names of the arbitrators for a particular case are taken from a list of lawyers qualifying and consenting to act, in alphabetical order, the first arbitrator named serving as chairman of the board. The hearing before the board is held without delay and the award is made within twenty days after the hearing. No record is made of the proceedings,

*United States District Judge.

stenographic or otherwise. The compensation of the arbitrators is determined by the court and paid by the county upon the filing of their report and award. Any party appealing must first repay to the county the fees of the arbitrators, and such fees are not recoverable as costs in the appeals which are tried de novo. The constitutionality of this arbitrator act has been attacked and has been upheld by the Supreme Court of Pennsylvania. From a two-year backlog in cases under $1,000, the dockets of the courts in Pennsylvania which have adopted the use of arbitration under the act are now up-to-date, all within a year.

In addition to the various arbitration plans. I am certain that most of you are also familiar in some degree with the running debate between so-called pedestrianism and motorism which has been appearing in some of our legal periodicals. The debate was caused by an old proposal, recently re-urged, to substitute the principle of liability without fault for the legal principle of no liability without fault in connection with automobile accidents. This principle of liability without fault was first seriously proposed in 1932 by the Columbia University Council for Research in the Social Sciences under the direction of a committee of leading jurists and actuarial consultants. This Columbia study purports to show that the application of the principle of no liability without fault has failed in relation to automobile accidents and that compulsory liability insurance would have no better fate. It proposes automobile compensation insurance for all persons injured in automobile accidents much in the same way that workmen are covered by workmen's compensation laws.

I realize that many of you have probably already decided that this Columbia report is the result of daytime dreaming on the part of ivory-towered professors. It may interest you to know that the chairman of the committee signing the report was Mr. Arthur A. Ballentine, law partner of Elihu Root. Other members of the committee were Charles E. Clark, Chief Judge of the Court of Appeals of the Second Circuit, Horace Stern, Chief Justice of the Supreme Court of Pennsylvania, and Henry W. Taft, distinguished New York lawyer and brother of William Howard Taft. The report of the committee was unanimous.

This Columbia report has been referred to by Governor Robert B. Meyner of New Jersey as one of "the most significant documents which have appeared in recent years." Needless to say, Governor Meyner has proposed automobile compensation laws for his state. While many states have adopted what has been erroneously termed compulsory automobile liability insurance laws, no state has as yet adopted the principle of liability without fault in automobile accidents. However, the province of Saskatchewan, Canada, has enacted into law the recommendations of the Columbia committee and there has existed in that province of our sister nation for the past ten years compulsory automobile compensation insurance. This insurance covers any person injured, and the next of kin of any person killed, in an automobile accident on the highways of Saskatchewan. This insurance also includes liability coverage which protects the owner and driver in the event he is sued for legal liability anywhere in Saskatchewan or throughout Canada and the United States. Under the Saskatchewan plan, the compensation payable to persons injured in automobile accidents is, of course, limited. However, any person has the right under the law to sue a tort-feasor on the basis of liability and receive full damages. The amount of the compensation award must, of course, be credited against any judgment obtained. Experience in Saskatchewan has shown that relatively few lawsuits based on liability are filed because very often the judgments obtained have not exceeded the cost of litigation, lawyers' fees and the compen sation award.

The arbitration acts and the Saskatchewan plan are indications of unrest caused by the delay in the administration of justice. The challenge of the lawyer at mid-century, particularly the trial lawyer, is to turn back these attempts to eliminate the legal profession from the administration of justice. The lawyer is now called upon to prove that the present system of justice can work and that the lawyer is an integral part of its working. In other words, the lawyer, as well as the administration of justice, must keep up with the time so that resolutions of the conflicts which inevitably arise in our industrial and economic system will not be sought in fields foreign to the law. I believe that the trial lawyer of today is meeting this challenge

and that, with the increasing assistance he is obtaining from the courts in the way of more efficient administration, the problem of congested dockets will be solved.

The trial lawyer at mid-century is a vastly different person than he was in 1900. His main assets no longer are a loud voice and a bag of tricks. His main energies are expended not in the courtroom, as in another day, but in the investigation and the preparation of his case, an investigation and preparation which looks toward trial only as a last resort, an investigation and preparation which seeks an evaluation of the case for proper negotiation and settlement.

Chief Judge Hutcheson of the Fifth Circuit Court of Appeals, on the occasion of the dedication of the College of Law building of the University of Illinois, this April 12, 1956, had this to say of the trial lawyer at mid-century.

"In almost every practical aspect, indeed except in fundamentals, the position of the successful advocate at mid-century—the equipment he needs and has, the success he may and usually does attain—is different from and better than at any other time. Instead of having his lawsuit carried on as a kind of journey into suspense, if there are alert and reasonable advocates on both sides, the case is either settled reasonably and promptly, or, if it is not settled, it can and will be disposed of upon its real issues, unclouded by the vagueness and inconclusiveness, and the unbearable delays which attended lawsuits in the days before judging became administration, when disclosures could not be compelled, delays could not be avoided, and bush fighting and shadow boxing were the order of the day."

Judge Hutcheson, after forty years on the bench, has a keen appreciation of a judge as an administrator. He realizes that if the profession of the law is adequately to perform its historic function, judges must cooperate with the lawyers in their preparation of their cases, with the evaluation of their cases and, if necessary, with the actual settlement of them. He believes, as I do, that trial should be reserved primarily only for those cases where jurisprudence is to be made. As for example, in connection with the personal injury cases now arising from the exploitation for oil in the tidelands of the Gulf of Mexico. I believe, with him, that the pre-trial conference is the greatest contribution that has been made to the administration of justice since the common law jury replaced trial by ordeal, and that proper use of pre-trial by the court, as well as by counsel, can greatly enlarge the capacity of our judicial system and at the same time increase its efficiency.

At the pre-trial conference, the judge often gets his first information about the case. At the pre-trial conference, after refining the issues, he requires both sides fully to disgorge all of their evidence, thereby eliminating the possibility of surprise. Both sides then know, also possibly for the first time, the strength of their opponents' case and the weaknesses of their own. In this way, trial by suspense, by bush fighting and shadow boxing is eliminated. The lawyers then know exactly what the evidence will amount to, and if the lawyers are worth their salt, they can place a proper evaluation on the case. A case properly evaluated by both sides at the pre-trial conference, sometimes with the help of the court, results in settlement of that case before trial. In this way, the burgeoning dockets of our courts can be scaled down without resort to the methods and devices which would eliminate the historic function of the lawyer in the administration of justice.

Discussion By Plaintiff's Counsel

S. Burns Weston*
Cleveland, Ohio

Mr. Chairman, if the Court please, Ladies and Gentlemen of the Jury: You must realize, I am sure, that the first thought that occured to me when I was placed in this predicament was the analogy of Dr. Jekyll and Mr. Hyde.

The plaintiff's lawyer is either Dr. Jekyll or Mr. Hyde, the defense lawyer is eith-

*Of the firm of Blackmore, McConnell, Cory, Burke and Kundtz.

er Dr. Jekyll or Mr. Hyde, depending entirely upon your perspective. I leave it to you to decide which is the monster.

I am making here first a few general remarks, not as a plaintiff's lawyer for the purpose of the day, but why I express myself as a plaintiff's lawyer.

Generally, I think, we can agree that the plaintiff's lawyer wants the mostest he can get and the defense lawyer and the home offices want to pay the leastest that they can pay, and that sounds just like a simple bargaining proposition. You make a demand for so much, and you make a counter-offer of so much, and sooner or later you settle, but of course it isn't that simple. It is a very complicated procedure actually.

There are many, many factors that go into the evaluation of a lawsuit, as we all know, whether we are on the plaintiff's or the defense side. The only difference is that in the application of those factors, it seems to me, the plaintiff's lawyer and the defense lawyers place a different emphasis and a different psychological approach upon the consideration of the factors that are important.

Now, Cam Buchanan said that I had never tried a plaintiff's lawsuit. That isn't true. Judge Miller sitting back there was in Cleveland some years ago on assignment to try some of our district court cases and I was there representing a plaintiff against a railroad, and was unbenighted enough to be representing a plaintiff on a crossing-accident case which, at least in Ohio, isn't exactly the best plaintiff's case in the warld. The judge was kind enough to let it go to the jury and we got a verdict, but then in due course, and quite properly, he took the verdict away from me and I didn't even appeal. By that time we had spent some $800 trying to prepare the case, for which we were never reimbursed, and I knew then, rather than wait till yesterday, that it wouldn't have done any good to appeal anyway. The judge made that very clear. (Laughter) As a matter of fact, I have never been in the Federal Court of appeals of our Circuit, and I am thinking I don't ever want to go. (Laughter)

Now, I have a few plaintiff's cases too. I have tried some, not many, so I have at least had a little experience from the point of view of the psychology of the individual trying a plaintiff's case.

I, like all defense lawyers, would just love to have one $1 million case—per year (laughter), and if we can find those where they don't conflict with our respected clients, I am sure that nobody is going to turn them down.

Now, my comments about the plaintiff's lawyer are based, as yours would be, upon experience with plaintiff's lawyers in settling cases with them and in trying cases against them. I am basing it upon experience with ones that I consider to be the top-flight plaintiff's lawyers in our community, who, I think, would hold their own with any known plaintiff's lawyers throughout the country, on the basis of what I have heard them say, what I have seen them do, and what I think they think without expressing it. So in part what I say is what you would hear, but in part it is what you wouldn't hear but what you would imagine went on in the mind of the plaintiff's lawyer. And so from here on, ladies and gentlemen, the "I" of these remarks is me as a plaintiff's lawyer, and I might say that any resemblance to any plaintiff's lawyer is purely coincidental, and I hope you will regard any resemblance to me as also coincidental.

First I would like to start with the facts because I don't care much about the law. (Laughter) The facts are that I have a client, Daniel Roberts—and we don't refer to him as Daniel, but as Danny—and this is the Danny case.

Now, Danny is 27 years old, a very fine young man, a terrific personality. He only had a seventh grade education but to prove his intelligence, with a seventh grade education he became a skilled machinist and was earning $170 a week. That is $8,800-and-a-little-over a year. You can't be dumb and do that.

Danny is married—as any upstanding young American would be—and he has three children, all little fellows—and girls—I have forgotten whether they are boys or girls or both—it doesn't make any difference, they are little. (Laughter) He has a beautiful wife, and she will make a very appealing impression.

Now, that is Danny. Danny's defendant here, it is a corporation—I want you to understand it is a corporation, not an individual. It is All American Motors Company, one of the biggest companies in the world. It tries to use the word "Amer-

ican"—sure it's American, but it's big—like all America.

All American Motors had a press that they wanted to have dismantled and they arranged with a contractor, or had arranged with a contractor, to have it dismantled, and they got mixed up in their bureaucracy, and they told them, "Well, now, you are ready to dismantle it. You can go ahead." And Danny overheard somebody say to his foreman, "Go ahead and dismantle the press," so Danny, being an eager fellow to do his job and do it quickly and do it well, proceeded to dismantle the press, assuming, of course, that nobody would ask him to dismantle a press that wasn't safe. And so he proceeded. But the electricity wasn't turned off and the air-pressure hadn't been turned off, and before long Danny was sailing through the air because the air-pressure forced the ram to hit him and knock him for a loop, and he went through the air some 15 feet, and when he landed he wasn't the same Danny. He wasn't the same fine young man that was earning a living for a wife and three children. He was an injured man, a crippled man, a permanently crippled man and he was without any earning capacity for a long time, and still is without any earning capacity.

And what happened to Danny? Well, Danny's left foot was so badly mangled in the fracture—the flesh was torn and they were afraid that gangrene would set in, and so on, and so they amputated it. He didn't have a chance to try to see whether or not it would heal. The doctors said they would have to take it off, so he became an amputee, his left leg—it doesn't make any difference whether it was the left or right. He has to use both feet—and his right foot was so badly injured that—oh, there was also a crushing fracture of the os calsis—I think that was on the right foot. It was badly injured, and he is so badly injured there is a permanent deformity there and as a result Danny has to wear a special shoe. So, with a permanent deformity of the right foot and a special shoe, special gadgets to assist him as best medicine can do, but medicine can't cure him, and with no foot on the left leg, Danny is disabled, crippled for life, a sad spectacle of what was a vigorous, athletic, able-bodied young man. The right arm also was injured, so much so that they had to do an open reduction and put a plate in there because the ulna was fractured, and Danny was in the hospital for four long months, suffering through those four long months, not to mention the suffering his wife went through, seeing no prospect of income then, or after the hospital, or even today. Danny is out of work. He has been so shaken up by this that there has developed a neurosis—no brain injury, but he has a neurosis about this business and he is humiliated, and it is going to be a long while before he can ever do any kind of work, and when he does it will be for a pittance of what he was able to earn before.

Now, there are three types of approaches, I think we can agree, that the plaintiff's lawyers will use in evaluating this case. The first approach is what has been referred to, or at least what I would refer to as the scientific approach, and it is so scientific we have a form prepared, printed. This is real. This is in Belli's book with an article. This was developed by one of my colleagues, my plaintiff's colleagues, in Cleveland.

On this form (See page 274), we give the name of the case, the date, the evaluator, the amount of the prayer, the insurance company, the attorney for the defendant, and then you describe the injury. Then, type of plaintiff, type of defendant.

Now, let me tell you how I am going to do that, how I would do it with Danny's case—without going into complete detail, except to emphasize, of course, that Danny makes an excellent appearance and so does his wife, and so do his three little kids who will be in the courtroom. The corporation, we put in here, is a corporation of substantial worth.

We then make any comments we want that we think are pertinent to the case, and then we come down here (indicating) to become really scientific, and we have on the left side a little box (indicating) that we call "Computations," and the computations are based on 100 per cent being the total, but liability is in the range 1 to 50 per cent: injury, age, type of plaintiff, type of defendant and out-of-pocket, each 10 per cent. We then grade these from 1 to 50 in one instance, and 1 to 10 in the others. (Indicating)

Now, liability-wise here I grade this at about 45. I think it is darned near 50 per cent—50 value—but we will give the benefit of the doubt to the defendant in this

and we will give it 45. Injury, we will give 10, because this is a horrible injury. Age, well, we will give about 9. What better do you want? He is a 27-year-old young man, married and three children. Type of plaintiff, well, I have already said what he is, so we will give him 9. Type of defendant, well, this is ideal. We will give that 10. Out-of-pocket, well, we have spent a lot of money: hospital, doctors' bills, in the future for further medicine, artificial limb, and so on. We will give that 10. So we add up to about 93.

Now, when you start off to figure out the value by appraising what we think is the likely jury verdict, and in this instance—and I might add, parenthetically, gentlemen, this figure for the jury verdict is not the one that I picked, but it was picked by a plaintiff's lawyer, from one of the leading firms in Cleveland. This was picked at $175,000, as a possible, probable, verdict. Well, then, without going through all the mathematics of it, we end up, by discounting some of these points here (indicating), with a value of $171,750 for settlement. You understand, these gentlemen of the panel don't hear me, what I am saying now. Then we have "Suggested Demands," a high, a medium and a final low. Now, we have computed $171,750, and in this scientific approach we are going to make a demand of $175,000—I won't tell you what we are going to take finally, not yet.

Well, that is the scientific approach.

Now, then, there is the next approach, which I call the demonstrative damages approach. You have heard a lot about demonstrative evidence. Well, there is demonstrative damages. It is the one that rings the bell for all you can on the human interest side of the picture, and it does that which will obtain a value which is the highest possible value which you can rationalize, and the way we do it, in the demonstrative damages approach, is to figure out the life expectancy of Danny. Well, now, life expectancy varies on what table you pick. If you take the combined tables, you range anywhere from about 29 years to 38 years, but they are antiquated, because life expectancy is greater today than it ever was before. We all know that. People are living longer. So we go to the 1949 Annuity Table and we find there that the life expectancy of Danny is closer to 45 years, on the basis of the way people live today. We know what Danny earns, and we want to know what it is going to cost to produce that income for the rest of his life. We go to an actuary—we will have him on the stand—and he will tell us that it takes $31,330 to produce $1,200 a year. Well, Danny was earning $8,800, but I am going to assume that you take about 8 times the $1,200, nearly $9,600, because after all he was a bright young man and he was earning $8,800 at 27, and he was going to earn more. That annuity incidentally, is based on a 2-1/2 per cent interest rate. We have to have something sure, sound, safe. So we multiply eight times that and we get $250,000-odd that it would cost, and which you, the ladies and gentlemen of the jury should consider as one of the figures in giving Danny the right amount of money. You add to that what you give him for the humiliation and pain and suffering and expenses—and then, of course, we are going to be fair with the defendants. Actually, there is also a "Disabled Persons" provision—they are going to bring it up if I don't, so we are going to discount that $250,000 a little bit because for a "Disabled Person" it is reduced to about $27,000. Well, if you multiply that by eight you get $216,000.

Now, my demand from the demonstrative damages standpoint is going to be higher than the scientific formula standpoint, because I am a little different type of plaintiff's lawyer. I don't want to settle this case. It is a juicy one. I want to try it, and I want publicity. I can get publicity. It will be over the front pages of the papers, and if you don't believe it, here is a sheaf of newspaper clippings (displaying a sheaf of newspaper clippings) in an actual case that started with newspaper publicity three of four months before the case. I am going to say that this defendant corporation is concealing its assets and I want to get the case advanced for trial because my man is destitute and they need money, so I get into the papers with a motion to advance on the ground of concealed assets. That is my allegation. I might say, parenthetically, it was never proven in that case, but it doesn't make any difference, it got into the newspapers.

And then we start trial, and the first day of trial the newspapers, after the jury is empaneled, have headlines. Of course, I never would initiate it, but the newspaper

boys like pictures and they are going to be there and they are going to have a picture of Danny without his foot and with his wife and his three kids, and then there is going to be a headline in the afternoon paper which the jury will see as soon as they get out. They will be told by the court not to read the newspapers. Maybe one or two won't. (Laughter) That headline will read something to this effect, in half-inch headlines: "Speed Danny's $500,000"—what is it? Is it $200,000? "$200,000 Lawsuit"—whatever the prayer is. It doesn't make much difference. "Speed Danny's $500,000 Lawsuit to Avert Drain of Assets." Oh, wait a minute. That was also the initial headline when they were concealing assets, and there was a picture then of Danny, but then on the day of trial we have: "$100,000 Offer Refused in Danny's Case." (Laughter) If you don't believe it, here it is. (Displaying a newspaper clipping)

Well, of course, that is a cinch for the defense counsel. They will go in and ask for a mistrial and they are sure they will get it—only they don't. They ask for a mistrial then. They ask for a mistrial every day that there is publicity, lawing that it is vicious, that it is wrong. They won't get it. And so it is in the newspapers day in and day out while the trial goes on for a couple of weeks, and my name is in the newspapers as counsel for Danny. I turned down $100,000.

Well, I don't settle cases during trial. Once I start I'm off for the wire. You don't stop me anywhere on the track, because I have got you over the barrel and I am going to make you try it.

But there is another approach, and that is the so-called practical approach. This practical approach lawyer would rather settle cases than try them, generally speaking. He recognizes he has competition with his other colleagues in the field and he wants to have that competition so he occasionally has to try a case, at least part way through. He will settle during trial—there was one recently for $120,000, with the picture of the client in the paper on a stretcher—and with it will be in the paper "$120,000 Settlement." and that is as good as winning the case because I have got the dough there.

Furthermore, I have got enough business—I started my business with sure things. I have mostly F. E. L. A. and Jones Act cases. These are composite pictures of different lawyers, you understand—anyway I don't have to worry too much, if at all, about the law. I am sure to win. I am sure to get a settlement of some sort, and so I don't care too much. And furthermore, the referring lawyers and "friends" prefer money now. They would prefer money now. They would rather see it and use it, then try it all out. I won't get many cases from some of my referring lawyers if I try them all out because if I do, then there is expense and there is delay and I don't get the money.

Now, there are a few general comments that I want to make. Whatever category I am, as a plaintiff's lawyer, I want to avoid trying any case that I may lose. If you think I can't do it, all you have to do is to see the settlements I get—because I know that the home office counsel and the defense lawyers want to settle. They would rather pay me to settle. I get my fees from them. I believe in insurance companies—they would rather pay me than pay the defense lawyer, because the defense lawyer, you know, he charges, too. He doesn't charge as much, oh no, because I can make more money out of one case in a year than all the money that a defense lawyer can make in an entire year. I make many more dollars than he does in a year.

You help me, you defense lawyers and you home office counsel, because you will see to it that the case is settled. You don't want to even let me lose a case because—you see, I like to encourage this idea of high defense fees anyway. One way I do it, I prepare my cases better than I used to, and I make the defense prepare them better as a result, and they take more time in preparation and put more time on the books and they have to charge more, and that is all a very good idea. It makes it easier for me to settle. Furthermore, I occasionally offer to a defense lawyer to come into partnership with me and sometimes some of them do it, and if they don't do it they will branch off on their own because they like to make money, too.

Then remember that I try the sure cases because I want the big verdict, but I will settle for 50 per cent, approximately, of the verdict, if it is a real big one, rather than to go through the trouble of appeal and the expense of appeal, because the cost of appeals scares the insurance compa-

nies. These big verdicts scare them. They know they don't pay all of those verdicts, but the verdicts scare them, so they will settle, and where I make my money isn't on the trial of a case, I make it by the settlements that I get. I have volume and I would rather make my money out of settlements, but I make my money out of settlements and make good money because I get a big verdict now and then and then they settle with me in the next case much more quickly because they just don't want to take that chance.

Now, some of these defense counsel say it is immoral for an insurance company to pay if there is no liability, where they are convinced they are not going to even get to a jury. Of course, I say that is nonsense, to say it is immoral is nonsense. What is immoral is not to reimburse Danny. Danny was injured through no fault of his own and he should be paid, and even if he was a little bit at fault, I believe in comparative negligence, and even though it may not be the law in my state, the juries accept it pretty well and they will give Danny some money anyway, so there we are.

Now I am going to close with this remark: there was an epitaph which I think is apropos to the defense lawyers and home office counsel, an actual epitaph on a little tombstone in Ithaca, New York, which read like this:

Here lies the body of Elaphalet Pease
Underneath the sod and underneath the trees
Pease was not there, only the pod
Pease shelled out and went to God.

(Laughter) (Applause)

CASE EVALUATION

Date Evaluator Case No.

LIABILITY $_____
Prayer Insurance Co. Attorney for Defendant

INJURY

Type of Plaintiff

Type of Defendant

Out-of-Pocket Subrogation? Deductible $_____ Medical Pay? $_____

COMPUTATIONS

Liability	1-50	
Injury	1-10	
Age	1-10	
Type of Pl.	1-10	
Type of Deft.	1-10	
Out-of-Pocket	1-10	
TOTAL		

100 [_____ (probable verdict)

AGE SCALE			
1- 7	10	40-47	5
8-15	9	48-55	4
16-23	8	56-60	3
24-31	7	61-65	2
32-39	6	65--	1

EXPENSES - 1 point for each $100.00

_____ Points in case × $_____ Point value = $_____ Settlement + $_____ Expense over $1000 = $_____ Full Settlement

Suggested Demands $_____ high $_____ medium $_____ final low $_____

Previous Demands _____
Dates and Amounts

Offers Made _____
Dates and Amounts

COMMENTS

Discussion By Defense Counsel

THOMAS M. PHILLIPS*
Houston, Texas

IT must be recognized, of course, at the outset, that there is no magic formula for settlement evaluation just as there is no magic formula for trying and winning law suits. Every law suit, in a sense, is a gamble –particularly where there are involved fact issues to be decided by a jury. The gamble is essentially this: Can the client's best interest be served by trying the case or by settling it on the amount fixed in the opposing party's best offer? Just as in the case of any other business risk, this gamble should or should not be undertaken on the basis of whether the odds favor it. What are the chances of winning the case or minimizing the damage as opposed to what amount will probably be lost if the case is not won?

Basically, this is the same question which the plaintiff's lawyer himself must resolve. Assuming that both lawyers have properly prepared their cases, investigated fully the law and the facts, and utilized the various discovery techniques, they should have substantially the same information about the case. Having the same basic facts to work with, then, both must take into account many of the same considerations in reaching a conclusion as to settlement value. Their approach, therefore, should not be altogether different.

Difference in Approach Between Plaintiff's and Defendant's Viewpoint

Although each must consider many of the same factors, the basic situations in which the defense lawyer and the plaintiff's lawyer find themselves are by no means the same. And it is this difference that leads to a somewhat different approach from a settlement standpoint.

The defendant's counsel is representing trained personnel who are in a position to offer experienced help in arriving at a conclusion as to settlement values. The plaintiff, on the other hand, is usually uninformed about law suits, and, if he has any outside opinion as to the value of his case, he has arrived at his beliefs through equally unreliable sources of gossip or newspaper publicity about other personal injury suits. This factor, as I see it, places a more serious responsibility upon the shoulders of the reputable and conscientious plaintiff's attorney who is his client's sole adviser.

Greater than this difference, however, there is another more important aspect to the matter that deserves mention. I refer to the nature or scope of the gamble to be undertaken by each side if the case is tried and not settled. The kind of gamble may be vastly different in the case of the claimant than in the case of the insurance company. The insurance companies, we are told, have an overall viewpoint which means, I take it, that the risk involved in the trial of any one case must be fitted in and balanced with hundreds of other risks in hundreds of other law suits pending all over the country. Regardless of the outcome of any particular litigation, disastrous though it may seem at the moment, the personnel of the insurance company will continue on much as before. In short, as I see it, the insurance company in any given case may be in a much better position to gamble than a seriously injured working man. Accordingly, it would seem that this may give an advantage to the insurance company. By the same token, the claimant has a corresponding disadvantage which has general relevance to settlement evaluation in that this disadvantage points up the absurdity of the practice, too often followed by the plaintiff's lawyers, of demanding exorbitant and outrageous sums in settlement.

This factor, I think, is clearly illustrated in the case at hand. Here the plaintiff undoubtedly has been rendered a cripple for life. Every moment of his existence has been changed for the worse, financially and socially. How he will spend much of his life in the future rests largely upon what is done with his law suit.

In the event no settlement is reached, and a trial follows, much will be made of this point by the plaintiff's lawyer before the jury. He will stress to the jury again and again the proposition that this

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is his client's last day in court, and his one and only opportunity to secure recompense for his grievous injuries.

But, how much consideration has the plaintiff's lawyer given to this fundamental point when he chooses to risk his client's fortunes upon the uncertain outcome of a law suit against the certainty of obtaining a substantial settlement. This same lawyer, if he stood at a dice table with only $500 to his name, would be most reluctant to shoot for the whole amount on one throw of the dice against a gambler who had a much larger sum of $10,000.

I mention these practical considerations not to advocate for a moment that any insurance company, because of its bigness, should be allowed to cheat or underpay a deserving claimant. I do offer these considerations, however, as food for thought in sharp contrast to some of the other statements or positions advanced by plaintiff's lawyers who claim to seek the so-called "adequate award" for the working man, and who profess an inability to understand why the insurance companies refuse to jump through the hoop to accept exorbitant settlement demands. With a certain amount of glibness, they charge that the defendant's counsel has no trouble at all in laughing off the pain of the suffering claimant.

In justification for charging their large contingent fees, we are also told by plaintiff's lawyers that they must try many losing cases wherein they spend their time and talent for nothing. Thus, for example, in ten cases where liability is 50-50, they say they expect to lose five of the cases, and must, therefore, collect for their time in the five other cases they win. Accordingly, pointing to the long run, they claim they are neither underpaid nor overpaid.

But, while these same lawyers are justifying their own existence and their manner of doing business, how much thought have they themselves given to the pain and suffering of the five *losing* litigants who, if we are to believe the jury speeches, must now become objects of public charity. Who now is being glib about the alleged misery of these claimants?

Would not these same lawyers have better served the interest of their losing clients by making more reasonable settlement demands and by accepting settlements less than the amount some wild jury has awarded a claimant in some other part of the country?

In the occasional law suit, the claimant's attorney finds himself with a case that appears to be a gold mine. He has a horribly injured client, and appears to have the insurance company over the barrel on liability. How often do we find plaintiff's counsel in this situation demanding a trial and refusing all conscientious efforts of the company to settle—solely because the lawyer seeks the personal aggrandizement that is supposed to follow a large verdict at the hands of a liberal jury?

Perhaps these considerations are too general, and admittedly they are more the business of the plaintiff's lawyer than of the defendant's attorney. But, if they are legitimate considerations, and I feel they are, I have seldom heard the plaintiff's lawyer give voice to them in urging the desirability of obtaining adequate settlements.

If this economic factor is, as I admit, too vague for practical use in the settling of any given law suit, there are other factors of a more definite nature that must be examined to determine settlement value in the particular case. Yet, even as to these factors, many of them are of such a fundamental nature as to involve individual judgment and considerable guesswork. They are factors about which reasonable men's minds can differ. As an example of the indefiniteness of these factors, there is the appraisal of the various witnesses. Everyone admits, of course, that the calibre of the witnesses to be used by each side will have much to do with the outcome of the particular case. Yet, everyone who has tried a law suit is familiar with the witness who, in preliminary interviews in the office, appeared excellent, but, who, despite all precautionary measures taken beforehand, proved disappointing in his actual performance on the witness stand.

Although settlement evaluation cannot be and is not a subject of exact science, nevertheless, there are these certain factors upon which judgment must be brought to bear and upon which an exact conclusion—in dollars and cents—must be reached. What are these factors? How are they arrayed in their relative importance? What factors rest largely within the domain of the defense trial counsel, and what other

factors rest more particularly within the decision of the Home Office counsel?

Everyone recognizes, of course, that there must be complete cooperation between Home Office counsel and the trial attorney before their mutual efforts can be successful. Too often, however, does one or the other fail to have the proper appreciation or understanding of the other's viewpoint. It must be completely obvious that since the money at stake is the property of the insurance company, it has the paramount right to decide to gamble it. So long as the trial attorney has performed his functions of advising his client of all of the factors relevant to the gamble and giving his client his deliberate recommendations, he must be content to follow the decision of his client as to the appropriateness of trying the law suit.

In a case that is settled, not much trouble arises. Rarely, if ever, have I seen a defense counsel insistent upon risking the trial of a law suit that could be settled with opposing counsel for an amount within the settlement authority granted by the Home Office. Here the trial counsel is usually content to follow the wisdom of the Home Office insurance counsel, and he thus gives clearcut recognition to the fundamental point that it is the insurance company's money that is at stake. This attitude, however, I must admit, is not always manifested where the decision is made to try the case. As a trial attorney, I am ready to concede that too often has he been prone to criticize his Home Office counterpart for the latter's decision to try the particular case rather than settle it on the terms recommended by the trial lawyer.

Factors of Local Significance

Having said this in behalf of the Home Office counsel, I must freely confess that my viewpoint is often times at variance with my employers—the insurance companies. I have often been puzzled by the failure of Home Office counsel to recognize and take advantage of the trial attorney's knowledge of certain local factors. So far as local factors are pertinent to evaluation, all Home Office personnel, I should think, should realize the superiority of the knowledge of the trial attorney. I refer now in particular to some of these local factors which are important in this respect.

Locale of the Trial

There is first to be considered the locality where this case is to be tried. This is usually the home ground of the trial lawyer, and a situation with which he is completely familiar. There are some, I am told, who contend that the locale of the trial should be given little or no consideration. Facts are facts, so they argue, and if properly presented to a jury panel, will be productive of substantially the same results regardless of where the trial is held. I sharply disagree with this viewpoint and urge the simple proposition that some localities offer a better opportunity to defend a law suit than others.

My home ground, I should think, is somewhat typical. In the radius of 100 miles from the place of my office, there are approximately 15 county seats and county court houses. Among those 15 counties, there is a complete difference in the method of handling the litigation. For example, in one county the population is made up largely of rice farmers who are conservative in nature, and who are prone to view with suspicion large demands in personal injury suits. Not 30 miles away is the neighboring county seat of a vastly different county. There many years ago industry moved in and brought with it a large influx of union labor. These jurors are most liberal in dealing with someone else's funds. On one edge of this 100 mile perimeter, there is a German community made up of stockmen and small ranchers. To these jurors, the awarding of $50,000 in damages in any type of personal injury law suit would be almost incomprehensible. On the eastern side of the 100 mile perimeter—in the heart of East Texas—lies still another county where it is thought smart to stick the large company, particularly when the claimant is one of their own kind. In this county, where politics are rife and ethics unknown, no type of law suit involving fact issues can be tried with confidence—regardless of the supposed strength of the defendant's evidence.

Home Office counsel, living in another state, thousands of miles away, cannot conceivably have the same grasp of these local situations as does the trial lawyer who is working and living among them from day to day. And if the Home Office counsel is unwilling to take the judgment of his local representative about these mat-

ters, then he obviously has the wrong lawyer, and there clearly is a fatal lack of understanding between the interested parties.

Type of Plaintiff

Then, also resting more peculiarly within the province of the trial attorney is the judgment of the capabilities of the witnesses and the parties. The type of plaintiff with whom we are dealing is unquestionably a vital consideration in arriving at a settlement value. How does he look? How does he talk? Does he have an even temper? Can he think on the witness stand? What is his family situation, his training, his education and means of making a livelihood? What is is race or nationality? Everyone would admit that the opportunity to view personally and cross-examine the plaintiff on oral deposition gives the trial lawyer a better insight into the plaintiff's position than that knowledge which Home Office counsel somehow has gleaned from the cold file.

Attitude of Trial Judge

Another factor which I would mention as resting within the domain of the trial lawyer has to do with the attitude of the trial judge. How strict is he in seeing to it that the plaintiff's counsel refrains from side-bar remarks and stays properly within the record? How will the trial judge exercise his discretion, which is quite large in numerous instances, in ruling upon the admissibility of certain evidence? What is his disposition toward remittiturs in the case of excessive verdicts?

Capabilities of Plaintiff's Attorney

Then there is to be considered the capability of the particular plaintiff's lawyer. How much experience has he had? How will he impress the type of jurors that you will normally anticipate in the particular locality where the case is to be tried? How prone is he to gamble? How careful and how complete will he prepare his case in advance? Granted that it is indeed dangerous to count upon the mistakes that you hope your opposing advocate will make, it is equally dangerous, I submit, to overlook the known capabilities of a competent, experienced and skillful lawyer on the other side of the table.

Recent Trends in Litigation

Then, also within the exclusive province of the trial lawyer is his knowledge of the recent trends in the particular locality in personal injury litigation. For reasons which are not always clear, it is unquestionably true that from time to time trends set in in a particular court house which are either favorable or unfavorable to the defendants. Although these trends are sometimes difficult to discern, every capable trial lawyer must always be mindful and on the watchout for them.

Down to this point, I have dealt exclusively with local factors having to do with settlement values—the plaintiff—the locale of trial—the judge—the opposing counsel—jury trends, etc. The trial attorney's familiarity with these local factors, I submit, is an indispensable tool of his trade.

Yet, how often has this weapon been disregarded or ignored by certain Home Office counsel—counsel who perhaps have not been close to any court house in twenty years, and who may never have even visited the community where the trial is to be held? Examine the typical file of some companies, and I think you will find the instances rare indeed where their Home Office counsel have openly recognized the importance of these local elements in arriving at a settlement evaluation.

Factors of General Significance—Relative Position of Parties

Turning now to other factors that play a part in evaluating law suits generally, there are certain rules of thumb which have been followed for years by lawyers on both sides of the table. These are factors wherein the minds of both Home Office counsel and trial attorney can be brought equally to bear. For example, there is the relative position of the respective parties. A personal injury case against a railroad, a bus company, or a large corporation is more dangerous from a defense viewpoint than the same case brought against an individual.

Type of Personal Injury

The type of personal injury in question is also of vast importance. Where the claimant must rely upon subjective symptoms, he is not in as strong a position to create sympathy at the hands of the jury as a plaintiff who can demonstrate his injuries visually and openly to the jury. Thus, a severe and disfiguring burn or amputation is obviously more dangerous

than a case of hysteria where the symptoms are vague and in dispute.

Liability Question

Then undoubtedly of the greatest importance to both parties, there is the question of liability. Here again—particularly in the face of disputed fact issues—is a factor which cannot always be isolated and looked at as though it were encased in a glass jar. Here again the problem of liability is tied up with too many human factors to be capable of exact scientific ascertainment. For example, where the injuries are indeed grievous, and where the plaintiff is cast in the role of an undoubted cripple, the human emotions of the jury will give him some advantage on the liability issues. Also, it is well known that a jury is prone to award higher damages in the case where liability is clear than where liability is doubtful. Nevertheless, it is upon the question of liability that we must ponder the most, and it is here that the greatest gamble is taken.

What Is the Settlement Value of the Present Case?

These, then, are some of the factors which must be considered in determining the settlement value of the case at hand. Looking more closely to our fact situation, it is readily apparent, I think, that the case is one of serious proportions. First, there is the position of the claimant. We are told he is a man who makes a good impression. This, of course, will stand him in good stead with the jury. Then there is the fact that he is a young man, only 27 years of age, which gives him a life expectancy of more than 40 years. His family situation is also appealing, for the conclusion will be inescapable in the minds of ordinary jurors that his wife and three young children will also suffer the consequences of the claimant's injury. His situation is further appealing in that because of his limited education he has little opportunity for work that does not involve manual exertion. Before his injuries, his earning record was quite impressive. In spite of his limited education, he was earning a livelihood of $170 per week, or an amount in excess of $8,000 per year. Multiplying this by his life expectancy, which is the method we may anticipate plaintiff's attorney will use before the jury, his loss of wages assumes astronomical proportions.

Contrasted with the plaintiff's position, he is arrayed, we find, against a corporation—a manufacturer whose name may be suggestive of a large and prosperous business. He is not suing another individual, and it will be obvious to the jury that as between the two parties the defendant is best able to suffer the economic loss arising out of this tragedy.

Then, there are the injuries suffered by the plaintiff which are of tremendous magnitude and are not limited to any single part of his body. One leg is gone; the other foot permanently deformed. He is required to wear braces which are undoubtedly necessary, and which need will probably exist throughout most of his lifetime. His injuries are unquestionably permanent, and beyond doubt they are sufficient to prevent his following his trade as a skilled mechanic, or any other work which requires manual exertion. Undoubtedly, he has suffered terrific pain and he will continue to suffer some pain, together with humiliation and mortification for the rest of his life.

Taking into consideration only these factors, I would be obliged to advise my client that no guarantee could be given that a jury would not award him an amount equivalent to my client's entire insurance coverage—$200,000. It is also my view that the question of liability would undoubtedly involve fact issues upon which determination by the jury would be final.

Further, it is my opinion that the jury will undoubtedly be influenced on the issues of liability by the pitiful, crippling nature of the plaintiff's injuries. Accordingly, as a result of these considerations, I am forced to the conclusion that the case has a very substantial settlement value.

Nevertheless, the liability issues, in my opinion, are by no means conclusive. Although the facts have not been fully developed, and Mr. Snow, I suspect, will have more to say on this subject of lack of information, there appear substantial chances for absolving the manufacturer of negligence, or convicting the claimant of contributory negligence. The defendant's representative did not actually mislead the plaintiff. No representation was made to the plaintiff that the air and electricity had been turned off the press, or even that the press was ready for dismantling. The plaintiff, on the other hand, was a

skilled machinist, who undoubtedly had had much experience in working upon this type of equipment. He must have known, therefore, that it would have been exceedingly dangerous to work on the press without first ascertaining if it were safe to do so. Just as an experienced and skillful gunsmith would not proceed to dismantle a gun without first seeing that the gun was unloaded, so it may be argued that an experienced machinist would not proceed to dismantle a press before taking the simple precautionary step of ascertaining that the electric power had been turned off. Undoubtedly, it would have taken only a moment for the plaintiff to ascertain that the machine was safe to dismantle, and, undoubtedly, had he taken this simple precautionary step, the accident would not have occurred. Thus, in my view, particularly in a jurisdiction where a jury is not informed as to the legal effect of answering special issues adversely to the plaintiff, there are substantial chances of convicting the claimant of contributory negligence. Even though the liability issues are resolved by the jury against the manufacturer, there are, in my opinion, excellent chances that the damage issue would be more moderate than the figures which plaintiff's counsel could add up on the blackboard. That is to say, since the liability issues are indeed close, the jury would be more conservative in fixing the damages. Likewise, the matter of liability is sufficiently in doubt that the claimant would not be in a strong position to risk a gamble for a huge sum of money against the certainty of a substantial settlement. These factors are sufficiently great, in my judgment, to reduce materially the settlement value of the case, and to bring the figure substantially less than the monetary damages suffered by the claimant.

The Indemnity Agreement

From the viewpoint of defending the manufacturer and its carrier, I find even greater satisfaction in the indemnity agreement. Upon studying the exact language of the contract and the applicable law in our hypothetical jurisdiction, two points immediately emerge. The indemnity agreement should be held to protect the manufacturer against its negligence unless, first, such agreement is ruled invalid as opposed to public policy; or, second, it is so construed to mean that the parties did not intend such protection. Admittedly, it is true that apparently some jurisdictions have emphasized the public policy viewpoint and have struck down attempts by an indemnitee to protect himself against his own negligence. Such a viewpoint, in my opinion, is both impractical from a business standpoint, and unsound as a legal principle.

Underlying the whole scheme of liability insurance is the idea of indemnity against the assured's negligence. Carried to its logical extreme, therefore, the public policy argument would strike down all attempts of business men to obtain insurance protection against their liability for negligence. Yet, no court, so far as I know, has ever invalidated an insurance policy on this ground. If a group of business men, owning an insurance company, can contract to furnish insurance protecting one against his negligence, why cannot this same group of business men, owning a machine repair shop, agree upon where a loss arising out of an ordinary business transaction is to fall? Public policy is no more involved in the one transaction than in the other, and if the liability insurance contract does not violate public morals, as obviously it does not, so the indemnity agreement between two business concerns should likewise withstand the charge of illegality.

The matter of construing the contract gives me more concern. Bearing in mind the established rule that such agreements are strictly construed against the indemnitee, we must face up to the fact that the agreement here does not specifically refer to the indemnitee's negligence. But, if the court holds here as a matter of law that the manufacturer is not protected against its negligence, such result, I submit, can follow only because the parties failed specifically, and in so many words, to refer to the indemnitee's negligence.

It is an obvious legal proposition, I take it, that this contract must be given a reasonable construction to carry out rather than defeat the purpose for which it was executed. Where the parties have clearly expressed their intent, as I think they have here, no sound result can be had by any further requirement that the parties use some particular phraseology that better suits a legal technician. There is no magic in the particular phrase "negligence of the indemnitee" just as there is no magic in

the phrase "negligence of the indemnitor." And, the absence of such phraseology should not be held to change an indemnity agreement wherein the parties have otherwise plainly expressed their intent. Thus, no one would contend for the proposition that the agreement did not cover the indemnitor's negligence just because there is no language precisely to that effect in the contract. So, the absence of specific language referring to the indemnitee's negligence should not, I submit, destroy the only practical and real protection which the indemnitee obtained in the agreement—that is, to protect himself from the consequences of the negligence of his employees.

With these principles in mind, I now call attention to the extreme broadness of the language contained in the indemnity agreement here. Notice that it covers "all risks" of injury to an employee of the contractor from "any cause * * * resulting from any action or operation under this agreement, or in connection with the work". This language, first appearing in Article VII of the contract, is reiterated in Article XV of the contract where we find the manufacturer protected against "all liability for injury or damages to persons".

CONCLUSION

Thus, while I believe that the case is sufficiently dangerous to justify a large settlement, I also conclude that my client should insist upon a most substantial contribution from the insurance carrier of the claimant's employer. Taking all considerations into account, I would expect the case to have a settlement value in the range of $100,000. I would insist, from my own client's viewpoint, that the other insurance carrier pay the equivalent of 70 percent of the settlement amount. This would mean that if my client could settle the case for an outlay of money in the neighborhood of $30,000, I would recommend this disposition. Beyond such an outlay of money, I would recommend the risk of trial, reasoning in the first place that my client had a substantial chance of defeating the plaintiff's claim in the trial on the merits, or holding the verdict within the amount of $100,000; and in the second place, that should the case be lost to the claimant, there would be at least a 70 percent chance of getting back the loss up to the amount of at least $100,000 from the other insurance carrier.

I think, on the other hand, an outlay of substantial money would be justified from my own client's standpoint for a number of reasons. First, the law relating to the indemnity agreement is not settled so that there is no positive assurance that it will not be invalidated, or not so construed as to relieve the other carrier of liability. Secondly, there are substantial chances, in my opinion, that the plaintiff will prevail on the liability issues, and will obtain a verdict in excess of $100,000, and in excess of the other carrier's policy limits. We have no information concerning the solvency of the machine repair company, and, therefore, no guarantee that it has sufficient funds to satisfy this kind of judgment. Finally, if the other carrier's coverage was insufficient, and the machine repair company is impecunious, even though the indemnity agreement was validated against the machine repair company, my client would have an exposure in the amount representing the difference between the other company's policy limit and the amount of the verdict.

Discussion By Home Office Counsel

GORDON H. SNOW*
Los Angeles, California

FOR one to place himself in a position to clearly understand and appreciate the mechanics and philosophy behind the insurance company's handling of this hypothetical case, as well as all cases, it is necessary to accept the postulate that all successful insurance companies operate on the basis of averages. To do otherwise would be to ignore the very principle which creates the need for insurance and which makes the insurance institution so important a part of our modern society.

*Vice President and General Counsel, Pacific Indemnity Company.

Thus, stated in its simpliest terms, the philosophy of insurance is spreading of the risk or, as so often has been said, "the premiums of the many pay the losses of the few."

It is not the function of the home office to duplicate or "second guess" the customary role played by local defense counsel. His function in the case is to carefully sift all evidence supplied to him by company investigators upon referral of the case and to prescribe further avenues of investigation which will have any bearing upon the determination of the liability of the insured (or the carrier, as the case may be), and to investigate and consider all law which will be applicable to the problems presented. His is the role of the supertechnician. Not only must he ultimately be satisfied that all facts bearing upon the issues have been thoroughly investigated and preserved and that a study has been made of all law applicable in the jurisdiction wherein the case will be litigated, but he must further have a thorough understanding of all local matters which will tend to influence the end result. He must know all there is to know about the local jury panel. He must have firsthand knowledge of what to expect from the witnesses by having observed and studied their demeanor. He must know what to expect from his witnesses. He must possess an intimate understanding of his opposition and always be ready to sieze upon any opportunities which present themselves. He must have perception and a keen sense of timing. In short, each case becomes a new career to the exclusion of all other matters.

The home office must treat this case as it must treat all cases, upon the basis that this is another of many cases. It must rely upon its local field office to supply certain tools necessary for it to form a determination as to what its position will ultimately be in connection with the case at hand. It must rely upon its local counsel to supply those things purely local in character which will have a bearing upon its deliberations. In short, it must accept a broad view on an over-all basis which will obtain the best over-all result. Hence, the home office may decide to litigate a case which appears insignificant to local counsel, the cost of litigating exceeding substantially what it would require to settle the case, but it may be motivated to do so by the fact that there are other more important issues involved than the immediate case under litigation. There may be other such cases pending in the locality or elsewhere. There may be the matter of precedent involved, and so on.

It is not here suggested that the home office should treat important cases lightly or with levity simply because they form the basis of part of the average. On the contrary, the over-all viewpoint contemplates a thorough consideration of all cases which comprise or make up the whole.

Proper administration of the home office function contemplates recognition of the purpose of the company's existence. It must always be remembered that there exists a deep-seated responsibility on the part of the company to the public. That responsibility, among other things, consists of need for prompt and efficient investigation of all claims and a timely overt effort on the part of the company to settle those cases which in its judgment should be settled.

Insurance companies alone cannot create conditions which will induce settlement of the greatest number of cases. True, they can manifest a willingness and a desire to do their part, but little can be accomplished without a similar effort on the part of other interests involved—the plaintiff and his lawyer who are frequently too prone to "try for the jackpot"; the judiciary who too often feels that he has fulfilled his obligations to the community by supervising the arena wherein the parties litigant will battle out their differences; and yes, even defendant's counsel who too often regards his position as being weakened by the making of any gesture of settlement and therefore jockies his case so that about four years and two per diems later a conclusion to the litigation is brought about through the medium of settlement, something which should have been done months or even years before with a great saving to every one concerned, for the processes of litigation are indeed costly.

Suit ratios of most insurers today indicate a continuing increase in the number of cases going into suit. Too many people are finding it necessary or desirable to litigate their claims. In time this will become an unbearable burden on an already over-taxed, over-tired, and exasperated public. The remedy is already apparent in the

popular belief expressed in many places, that the whole mess can be cleaned up by adoption of state-operated or controlled adminstrative boards who would dispense mass justice through "cookbook" techniques in lieu of present methods. This is by no means a new and novel suggestion but nevertheless a realism which is gaining ground daily in popularity.

However, it is not the purpose of the writer to debate the merits of such a program but rather to point up the fact once again that if we cannot run our shop in a businesslike manner and to the reasonable satisfaction of those who must foot the bill, some one else is likely to be running it for us, using methods designed to overcome the enormous problems which have grown out of our present system.

The remainder of this statement will be confined to the methods employed by one insurance company in an effort to meet the challenge of existing conditions. There will be no claim that this system is superior to all others. It seems best suited to our operations, but no doubt other companies would find the methods inappropriate foi their requirements and thus would devise something more suited to their needs.

The objective is to put the insurance operation on some basis which will enable it to quickly and efficiently determine the facts of a case and the law applicable thereto and to quickly thereafter make an appropriate evaluation of it and dispatch a money authorization into the field, thus enabling early negotiations. Bearing in mind that all companies are confronted with a large book or portfolio of pending claims, some 16,000 in our case, requires that production methods be adopted insofar as it is possible to adopt such methods.

Some time will be spent on the mechanics of this system as it is felt that a better understanding of these operations will be of considerable value to those of you who are working constantly with the insurance carrier and where quite frequently misunderstanding and inappreciation results between the home office, the field office, and trial counsel.

Field offices are given complete autonomy to handle cases within certain blanket authority which enables immediate disposition of the greatest bulk of cases. Above this amount or in cases involving unusual issues or problems, the case is submitted to the home office on the basis of three reporting forms.

I. File Synopsis

The factual aspect of the case is briefly recited by the field office and directed to the attention of the home office in what is termed a File Synopsis. As the words suggest, this is a resume of all the material facts of the case contained in the file, set up under nine captions as indicated by the File Synopsis attached and marked "Exhibit I," which deals with our hypothetical case. The captions are designed to compel a complete investigation by the field force before the synopsis can be properly submitted.

To the field office this serves as a check list very much as the check-off list used by airplane pilots when manipulating the many complex controls necessary to land a large plane. It serves as a check against human failure or inadvertence when dealing in detail. It is expected and of course imperative that the synopsis be accurate and brief—seldom more than one page—for from this synopsis the home office, having before it a summary of all the factual material, makes a determination as to the liability of the insured or the company, as the case may be. The form is color coded (yellow) to provide a method of quick reference among other file papers in both the field and home offices.

Where any unusual issues of law are involved, particularly of a local character, a greatly condensed brief is attached, usually prepared by the home office. This too is color coded (blue) for quick reference. (See Exhibit I (a) in our hypothetical case.)

II. Claimant Synopsis

The second form is entitled "Claimant Synopsis." It contains all information relating to the damage aspect of the case; i.e., the status of the claimant as related to the insured (guest, pedestrian, business visitor, trespasser, licensee, etc.), his marital status, list of injuries, list of special damages, resume of report of independent medical examiner, etc., as more particularly set forth in detail in our hypothetical case. This, too, is limited to one page and is color coded (salmon). (See Exhibit II in our hypothetical case.)

III. Authorization Request

The third and last form used is entitled "Authorization Request." It is prepared under three headings and its purpose is to enable the field office to enlarge upon the material contained in the preceding two forms and to generally discuss the case. Again brevity is emphasized, and again the form is color coded for quick reference (green). (See Exhibit III in our hypothetical case.)

It is contemplated that these forms will be contained in every file on the inside of the file jacket, immediately accessible. It is contemplated that the home office, with these forms in its possession and nothing else, is in a position to respond to the requirements of the field office regardless of the amount of money involved within a matter of a few minutes after the material reaches the home office. There are rare exceptions to this method of handling claims on a production basis, but they are so rare that the system accomplishes essentially a complete resolution of the problem which exists in attempting to handle large numbers of claims by the main process of rereading all of the detailed material submitted by the field office, because so frequently it is found necessary to dispatch a request to the field for further additional investigation which perhaps has been overlooked by the field office when claims are handled on a volume hit-or-miss basis.

This brings us to a point where certain criticism can be levied against the "field office" and "local counsel" in connection with the handling of the hypothetical case. The materials submitted to the home office tells only part of the story, and in some respects appears to give rise to inconsistencies particularly as relates to the medical aspect of the case.

Apparently there was no canvass of the scene to interview the many witnesses who must have been present during the conversation which took place between the two foremen and others. No investigation has been made as to the background and experience of the plaintiff in connection with his handling of matters of this kind so that we might be in a better position to evaluate the defense of contributory negligence. No detailed information has been given to us with reference to the precise mechanical nature of the machine involved, its switches, buttons, levers, etc., which would have some bearing upon the plaintiff's ability to recognize whether the air connection had been in fact disconnected.

The medical report submitted to us outlines a very serious list of injuries but concludes that the man is getting along satisfactorily and that there is no contra-indication at this time to him doing certain forms of work. It is difficult for us to conclude, however, from the listed injuries that this man is anything other than gravely and permanently disabled. Under the circumstances, it would appear that a complete examination should be made by a disinterested medical examiner.

Under the circumstances, we would be reluctant to see this case litigated, for we think it has the ingredients for a jumbo verdict.

Neither the field office nor counsel has informed us as to the jurisdiction wherein this case will be tried. They have not supplied us with pleadings. They have not commented upon the nature of the local situation, particularly as relates to what juries have done with similar cases in the immediate past. This is essential as it so materially influences the value of the case. Neither the field office nor counsel has given us any inclination as to whether an attempt has been made by any one to negotiate a settlement.

In conclusion, this is a poorly investigated and handled case which has required that we interpolate or anticipate certain things which may or may not exist. However, we are extending an authority of $60,000.00 pursuant to the request made for this authority, based upon the file in its present condition.

As relates to the indemnity agreement existing between the manufacturer and the machine repair company, it is recommended that we immediately serve notice upon Machine Repair, Inc. to take over the defense of this case and to dispose of it, and in their failing to do so we will hold them responsible for all loss or damage. We are attaching a brief covering this aspect of the case to aid in the further handling of this claim by the field office. It is anticipated that Machine Repair, Inc. will refuse to accept defense of this case, and therefore we think settlement of the claim is the appropriate procedure so as to estop the danger of a jumbo verdict against the manufacturer.

Exhibit I

Special File Synopsis

To: H. O. General Counsel
Date June 15, 1956

From: H. O. Claims
Claim No. 13 GL 00500

Insured: Machine Repair, Inc.
Claimant Daniel Roberts

I. *Coverage*

General liability policy with $200/400,000 limits. Contractual exclusion deleted by rider. Coverage to be extended to Hold Harmless Agreement contained in contract between assured and All American Motors Company if indemnity agreement valid.

II. Actions

Suit by assured's employee in Federal District Court against All American Motors Company for personal injuries. Prayer for $200,000.

III. *Facts*

The accident occurred on February 13, 1952. Roberts' employer, Machine Repair, Inc., a contractor, had a written contract with the All American Motors Company for maintenance of factory equipment and machinery. The manufacturer gave the contractor an oral authorization supplemented by a written purchase order at a later date to dismantle a press. The manufacturer, before turning over the press, removed the dies. With the removal of the dies, the die-setter informed the contractor foreman that he could take over the press. The contractor's foreman misintrepreted the statement, thought the press was ready for dismantling, instructed the plaintiff to commence dismantling. The manufacturer and contractor each claim that it was the duty of the other to cut off the air and electricity. The electrical power and air pressure were not turned off the press. Roberts heard the manufacturer's die-setter tell his foreman that he could have the press, and therefore went to work without inspecting the press. As the dismantling proceeded, the air pressure forced the ram on the press upward striking the employee of the contractor, Roberts, and throwing him from the press.

IV. Witnesses (1) Die-setter for All American Motors. Unfavorable. (2) Foreman for Machine Repair, Inc. Favorable.

V. Further Investigation

It will be necessary to canvass all possible witnesses to this accident and the conversations which took place immediately preceding it. Signed statements should be obtained from all such witnesses having any information bearing upon any phase of this case. An up-to-date medical report by an independent examiner should be obtained at this time to determine the exact nature and extent of disability, together with as accurate a prognosis as possible.

It will be necessary to develop through witnesses the custom and practice in the industry relating to the type of operation which led up to the accident. It will further be necessary to develop by statement or deposition from the claimant the experience he has had with reference to handling this type of equipment so as to be in a better position to evaluate the defense of contributory negligence.

VI. Claimant

Daniel Roberts—See Claimant's Synopsis attached.

VII. *Laws*

There are no unusual issues of negligence law involved insofar as the liability of American Motor Company to claimant Roberts is concerned. This would seem to be a question of fact and thus determinable by the jury.

A question arises as to the position of All American Motors under its indemnity agreement over and against Machine Repair, Inc.

VIII. Negotiations—None

IX. Future Handling

Complete research on legal questions including extensive discussion with experts. Negotiate settlement if indicated.

Exhibit I (a)
Inter Office Communication

TO: H. O. General Counsel
FROM: H. O Claims

Date: June 1, 1956

In evaluating the hypothetical situation presented for discussion by the forum, it becomes necessary to resolve the issue of negligence, presented in the action by the employee, Roberts, against the manufacturer, All American Motors Company. Mr. Montgomery has suggested that all parties stipulate to the following rules: (1) That contributory negligence would bar recovery. (2) That the doctrine of "Last Clear Chance" be recognized. (3) That damages would be fixed by the jury. (4) That settlement cases would be determinative for the purpose of evaluating damages.

It would appear from a reading of the statement of facts that some of the fundamental issues to be determined are: (1) The negligence, if any, of All American Motors, Inc. (2) If All American Motors were found to be negligent, was the plaintiff, Roberts, contributorily negligent so as to bar recovery? (3) Is there a question of whether "assumption of risk" is involved? These issues will be discussed in the above order.

I. *Negligence of All American Motors Company*

It first becomes necessary to determine whether All American Motors owed a duty to Roberts as an employee of an independent contractor. The general rule in such situations is to the effect that the contractee is not liable for injuries to employees of a contractor while engaged in work which is under the exclusive control of the contractor, nor does a contractee owe the contractor's employees a duty to furnish a safe place to work under such circumstances. A contractee can be held liable to an employee of a contractor for injuries caused by defects in instrumentalities furnished for work under the contract. There are quite a few ramifications under this rule, but based on our discussions of the matter, it is questionable whether the press, which the employee was to dismantle, would be considered an instrumentality furnished. It is actually the subject matter of the contract, and as such it would not appear to fall within the definition of equipment furnished.

A contractee is always liable to an employee of a contractor where there is an affirmative misconduct on the part of the contractee or his servants. This could include improper directions during the progress of work, or failure to warn against certain dangers. This rule of law would seem to raise the question as to whether the conduct of the manufacturer's foreman in turning the press over to the contractor's foreman, prior to turning off the air and electricity, would be considered affirmative misconduct. That is an issue which would probably go to the jury, and the answer would seem to turn on the custom and practice in such situations. In evaluating this case, I think it would be very dangerous to assume that a jury would not find negligence on the part of All American Motors Company because of the failure of its foreman to advise the contractor's employees of the fact that the machine was not disconnected.

A contractee can also be held liable for a dangerous condition of his premises as to invitees. This rule is stated in an early English case as follows::

> "I think that a man who intends that others shall come upon property of which he is the occupier for purposes of work or business in which he is interested, owes a duty to those who do so come, to use reasonable care to see that the property and the premises, upon which it is intended shall be used in the work, are fit for the purpose to which they are to be put . . . the owner of premises owes duty toward those whom he invites and to take case to see that the premises are in a fit state of repair."

Again there is a question as to whether the press would be considered part of the premises, so as to hold the manufacturer liable for its dangerous condition. Since it was part of the contract, I do not think that this rule would apply, and even if it would apply, there is a question as to whether any duty would exist after possession and control of the premises on which the work was to be performed, since the *press* had been transferred by the contractee to the contractor.

To summarize this general discussion, it would seem that there is considerable doubt as to whether the contractee owed a duty to the injured employee. However,

the question of affirmative negligence of the manufacturer's foreman in not warning the contractor's employees contains considerable danger and, as indicated above, it is felt that the jury could quite readily find liability on that basis.

II. *Contributory Negligence*

Assuming the manufacturer was negligent through the conduct of his employee, a further question is raised as to whether the injured party was himself negligent.

In the statement of facts, it is indicated that the employee immediately began work on the press without specific instructions from his immediate foreman, and apparently without inspecting the machine, after overhearing the manufacturer's foreman state that they could take over the press.

There are cases which hold that an employee is negligent where he has gone into a place where he knew, or ought to have known, that he would be exposed to danger, or that he failed to take some precaution which would be appropriate for the purpose of safeguarding himself under the conditions incidental to the performance of his work. If an injured person is chargeable with actual or constructive notice of dangers incident to his work, and to which his injury was attributable, proceeding under such circumstances it can be considered as an inference of contributory negligence.

On the basis of the bare facts given, it would seem that the plaintiff's conduct was not reasonable under the circumstances, and that a jury could very well find that he contributed to his own injury by his failure to inspect the machinery before attempting the dismantling process.

In Corpus Juris Secundum, it states that a servant, who has control of or is connected with the cause or subject of danger, is chargeable with contributory negligence, precluding a recovery for injury, if he fails to exercise ordinary care with respect thereto. That rule would seem to apply squarely to this case.

III. *Assumpion of Risk*

Mr. Montgomery did not suggest a stipulation as to the application of this defense; however, I assume that it would be available. This defense is contractual in nature, and normally would not apply except in an action by a servant against his own master. However, there is authority for the doctrine that it is a valid defense in an action brought by a contractor's employee against the contractee. If the doctrine is to be applied, there must be a showing that the employee was aware of the dangerous condition and assumed the risk voluntarily. This is primarily a question for the jury. Although there is some authority to the effect that whenever it appears the injured person was chargeable with knowledge of the risk, it becomes a conclusion in point of law. In either event, it seems doubtful that the defense would be available in the present factual situation.

IV. *Conclusions*

As indicated above, there is a strong possibility that a jury could find negligence on the part of All American Motors, and contributory negligence on the part of the injured employee, Roberts. However, because of the severe injuries sustained by Roberts, there is a dangerous sympathy element present.

Because both the applicable law and the factual details are indefinite, the best percentage of winning this case would be in the vicinity of fifty per cent. In order to arrive at a value on this case, we would have to place a value on Roberts' injuries. Again, we are handicapped for lack of information, as to what similar cases would be awarded in the jurisdiction where this case would be tried. I will not attempt to place a value, but rather will leave that evaluation to your judgment.

In addition to arriving at a value of the negligence action between the employee and All American Motors, it is necessary to further evaluate the possibility of a successful defense of the subsequent suit by All American Motors against Machine Repair, Inc., under the Hold Harmless Agreement. The issues presented in the second suit are discussed under a separate brief, the conclusion of which was to the effect that the Hold Harmless Agreement would be held valid and the possibility of a successful defense is practically nil.

Accordingly, the over-all evaluation of this case would include: (1) the value of the employee's negligent action; (2) the value of the action by the carrier for the All American Motors and finally, the cost of defense. By arriving at a composite figure for these various exposures, we would be in a position to place an over-all value on this case from the point of view of an insurance company.

EXHIBIT II

Claimant Synopsis

To: H. O. General Counsel
From: H. O. Claims
Insured: All American Motors

Date: June 15, 1956
Claim No.: 13 GL 00500
Index Bureau Cards Sent:
Preliminary: Yes Permanent: Yes

Claimant: Daniel Roberts
Clt's Dr.: ..... M. D.
Clt's Atty.:

Address:
Address:

Type of Clt.: Male Height:
Age: 29 Marital State: Married
Wage: $170 wk. Birthplace:
Occupation: Machinist

Weight: 170 lbs. Complexion:
Color of Hair: Color of Eyes:
Nationality: U.S. Race: White
Scars or Deformities:

Special or Consequential Damages Claimed

1—Comp. Lien $10,000.00
$5000 Med.—$5000 Comp.

2—Wage Loss Exess of Comp. $20,000.00
(Est. $7000 per yr. for 3 yrs.)

3—

4—

5—

5—

Total $30,000.00

Injuries Claimed

1—Fracture ulna and radius right forearm at junction lower thirds
2—Fracture shaft of right 4th metacorpal
3—Linear fracture medial plateau left tibia in satisfactory position.
4—Complete crushing injury to most bones of left foot resulting in amputation of left leg through lower one third.
5—Severe comminuted fracture with marked flattening of tuber angle of right os calcis.
6—Complete dislocation of naviculor and other distal tarsal bones with relation to the os calcis, and talus, associated with fracture of at least the naviculor and possibly other tarsal bones (right foot).
7—Fracture of head of right 5th metatarsal in satisfactory position.

Disability Claimed
Partial: One year.

Total: Two years (Estimated)
Permanent: About 75% totally disabled. (Estimated)

Summary of examination by Dr. ..... M.D. on 12-16-53.

Amputation which has caused loss of the distal portions of the shafts of the left tibia and fibula with the ankle and foot is essentially unchanged since our last examination. No definite sequestrum or active osteomyelitis is revealed. There is a minimal soft tissue pad over the end of the bone. Fracture involving the internal tuberosity of the left tibia at the knee has healed with solid union with some depression of the tibial plateau.

The extensive fracture of the tarsal region of the right foot which caused much irregularity of the os calcis, astragalus, and most of the anterior tarsal bones has undergone complete healing with considerable loss of the plantar arch and much disturbance in all of the articulations. No active disease is revealed.

The fracture of the right ulna has not united by bony union; the roentgen appearance is that of fibrous union. The fragments are still held in good position by the metal plate and four screws. No active disease is seen but there is some absorption about the plate and screws as from motion at the fracture site.

This case, of course, with the multiple injuries, was somewhat difficult to handle and to evaluate what was best for the patient. He is getting along satisfactorily. There is no contraindication at this time to him doing certain forms of work. He will continue to require observation for several months. He will, of course, continually require braces and his prosthesis refitted from time to time. We are doubtful that any surgery will be necessary to the arm, as he will not be able to climb or do heavy work. He has learned very well how to take care of himself.

Suit: Ad Damnum: $ Place of Trial: Judge Jury
Earliest Trial Date: Defendant's Atty.:

Evaluation	(Date)	Demand:	(Date)	Offer:	(Date)	Authorized:	(Date)
$60,000.00—		$ Unknown—		$ Nil—		$60,000.00—	

EXHIBIT III

Special File Authorization Request

To: H. O. General Counsel
Date: June 15, 1956

From: H. O. Claims
Claim No.: 13 GL 00500

Insured: All American Motors
Claimant: Daniel Roberts

I. Value

The liability of the insured in this case probably will turn on issues of fact. Likewise, the contributory negligence of the plaintiff, Roberts, will turn on issues of fact.

There seems to be ample evidence to indicate that the insured's employee was rather indefinite if not careless in his remarks to the foreman of Machine Repair, Inc. that the machine was ready to be taken over by Machine Repair, Inc. for dismantling. There would seem to be the same degree of indefiniteness and vagary insofar as the foreman of Motor Repair, Inc. is concerned and this would be true, to a certain extent, of Roberts, the plaintiff, who overheard all of the conversation, apparently. Therefore, there is a good basis to argue contributory negligence on the part of Roberts, particularly if he was an experienced employee who had undertaken to do this sort of thing on previous occasions.

However, the injuries which Roberts sustained in this case are of such a grave nature that it is inconceivable that the average jury would turn him away on the basis of his contributory negligence. We believe the most optimistic estimate that can be placed on this case from the standpoint of a successful defense is that we have, at best, less than a third of a chance to win it.

This case is also complicated injurywise by the fact that the plaintiff sustained such a large number of independent severe injuries. Any one of these injuries in itself is moderately severe to very severe in nature. Therefore, an attempt will be made in the authorization request to evaluate these cases on the bases of the individual injuries without losing sight of the fact that the composite injuries probably produce in this man close to a permanent disability case. Therefore, referring to the injuries as enumerated on the Claimant's Synopsis, the following estimates are made:

Injury #1	$10,000–	$ 15,000
Injury #2	500–	750
Injury # 3	4,500 –	6,000
Injury # 4	40,000–	60,000
Injury #5 and #6 (combined inj. to R. foot)	15,000–	25,000
Injury #7	750–	1,000
Normal range of verdict	$70,000–	$110,000
Average probable verdict		$90,000
Discount of one-third for probable successful defense		30,000
Settlement value of case		$60,000

The injuries sustained by this man are so severe that almost no verdict returned by a jury would, in our opinion, be reduced. However, working on averages, we feel the case justifies a settlement of $60,000, as above indicated.

II. *Future Handling*

Aside from the additional investigation recommended in the File Synopsis, future handling should consist of every effort to make settlement of the case. This case has the potential of a jumbo verdict, and our view as to the possibility of being able to successfully defend it is not realistic.

A substantial offer should be made as quickly as possible and that offer should be realistic. Too small an offer will tend to freeze the negotiations. Therefore, we think an opening offer should be made in the vicinity of about $40,000 to $45,000.

III. *Authorization Requested* $60,000

The Pre-Trial Conference

CHAIRMAN MONTGOMERY: WE now come to the pre-trial conference.

Mr. Phillips, you will be presumed to be representing the defendant in the case, with the indemity to be decided later. Futhermore, I do wish to say that Mr. Phillips did not prepare these facts. He had no part in the preparation of these facts. Any criticism that is to be raised should be directed against the people who prepared the facts. They invite criticism—or praise. [Laughter]

Judge Wright, I will now hand the matter over to you.

JUDGE WRIGHT: Now we have come to the day of trial. We have gotten the lawyers in chambers and we open our remarks to the lawyers something along these lines:

Now gentlemen, this case will probably take about a week or a week and a half to try and therefore I have got you here in chambers in a last-minute effort to see whether or not we can avoid this trial.

You are both grown-up people. You both know as much about this case now as you will know after all the evidence is in. The case is thoroughly prepared and certainly you are in a good position to appraise—you are in a better position to appraise the case than any jury would be, so it would seem to me that now we should get down to brass tacks and decide exactly what this case is worth and settle it at that value.

Customarily the plaintiff's lawyer is asked first in what range he thinks the case should be settled, and so we start with a question something along these lines:

Mr. Weston, you have studied this case and you know the weaknesses of your case, you know the possibility that there will not be a jury verdict in your favor. In what amount do you believe that Mr. Phillips could reasonably recommend to his insurance company that this case should be settled?

MR. WESTON: Your Honor, I have to take exception. I don't feel that there is any weakness to my case. I don't think there is any chance that I can lose it. I have to operate on the assumption that I have a strong case that is going to be won through a jury, and I am not concerned about this indemnity business. I will get my money anyway. Are you asking me, Your Honor, for an offer or a demand at this time?

JUDGE WRIGHT: I am asking you candidly to state what you believe that Mr. Phillips could reasonably recommend to his insurance company as a settlement of this case?

MR. WESTON: Well, I think, Your Honor, if I may put it this way: I will indicate what I will recommend that my client accept, and the insurance company will have to make up its own mind whether that is fair or not from its point of view, but I have to protect my client. I have an injured man here. I have an injured man here and I have got to have $175,000.

JUDGE WRIGHT: Mr. Weston, that is not realistic, and you know it isn't realistic. The exposure here is only $200,000 and certainly the insurance company in the case, if it can win, is not going to recommend $175,000 of that $200,000 in settlement. Now, I think that we ought to get down to brass tacks. The jury is outside waiting. Let us now put in your offer and settle this case and let us make it a realistic offer.

MR. WESTON: Well, I thought that was realistic, Your Honor. I know the jury is out there. I am anxious to see them. I think there is a pretty good jury there. I know some of them.

This is the first time—this is a very rare occasion when I know the policy limits. $200,000 sounds pretty good to me. I don't know, maybe my offer was too low.

Sure, the insurance company may not have to pay out the full amount of the verdict because of the indemnity agreement, but somebody is going to pay me. If I get a verdict against them they are going to have to go to the expense of collecting against the other carrier under the indemnity agreement. If they are not going to pay that, that means higher defense fees, and they are not going to like to pay fees twice, bad enough to have to pay once. So that, Your Honor, until I hear something from my opponents it seems to me that $175,000 is not unreasonable, if I may beg to differ with the Court. It isn't unreasonable, I think. If my client received that amount, he and his wife and his children then would be in a position where they could look forward to the future with some reasonable expectation that the kids

would go to college. The kids are all bright They will all probably be doctors and lawyers. But if I don't get that money they can't do it, not to mention the injury to their father.

So I am sorry, Your Honor, my client and I discussed this beforehand. My client would like $200,000, but I thought that was a little unreasonable and so I have suggested that maybe $175,000 wouldn't be unreasonable and reluctantly my client agreed with me when I made that offer.

JUDGE WRIGHT: Now, Mr. Phillips, we have heard at length from the plaintiff's counsel in this matter. What has been your thinking while counsel was making his statement? In other wards, we want you, as well, to give a realistic picture.

I realize that you have been shocked by the figure recommended, but you must remember that this is a serious case from your standpoint and it is serious both from the standpoint of liability as well as from the standpoint of exposure. Such injuries could easily result in a verdict in the full amount of the policy. I was wondering whether or not you feel yourself in a position to give a figure in the range in which the case should be settled?

MR. PHILLIPS. Well, Your Honor, first I should like to tell you how much I appreciate your interest in the matter and how I join with you in your disappointment with our good friend Burns over here, not only disappointment about him submitting a ridiculous figure, but disappointment at his taking up your time in that regard, and realizing, if I may say so, Your Honor, that you are indeed serious and not wanting to waste your time further, I might state to you that we do regard the injuries as serious, but on the question of liability we think the plaintiff would be lucky to get 'most anything.

It so happens that I represent in this instance a very fine company with a very liberal viewpoint and have the benefit of their head counsel here today and he has very generously extended authority, which I submit would be a most generous figure for this lawsuit.

MR. WESTON: Your Honor, may I say one word? You, in your comments to Mr. Phillips said that—which is exactly what I feel—you said this verdict may bring the policy limits, and that is $200,000, which shows, of course, that $175,000 is a very fair figure.

JUDGE WRIGHT: You must also realize that the verdict might be for the defendant and that would bring you nothing, so that remark I made to the defendant's counsel cuts both ways.

Now, I realize that counsel have really not got down to the meat of this situation yet. I realize that counsel here at the last minute with the case just about to go to trial, are still sparring. Neither one of you has come up with a realistic figure. Both of you are hesitating 'way above and below the actual definite amount that you have put on this case for settlement in the hope that it may go a little higher than you really know it is worth or a little lower than you really know it is worth.

Now it seems to me that we have had an opportunity to study the case during these pre-trial conferences that we have had, we have seen the medical reports, it seems to me that this case is one that will probably bring a verdict for the plaintiff. I would say that the liability is not clear, but the injuries are so clear that, as a practical matter, the lack of clarity in the liability will be made up for by the clarity in the injuries. It is a jury phenomenon that when they can see an injury such as the plaintiff has, that in itself will make up, to same extent at least, for a lack on the liability side. So I say that this case will probably be won by the plaintiff, but certainly we cannot and should not rule out the possibility that there will come a verdict for the defendant. Further, you must realize that there will be two or three or four members of this jury who probably want to find for the defendant, who feel that there is no liability at all and in spite of the sympathetic aspects of the case, justice should be done by bringing in a verdict for the defendant. These three or four jurors will have to be won over and the way juries usually win them over, as you all well know, is by cutting down the amount of the verdict. In other words, some of the jurors might want to give $200,000, but in order to win over these ones who want to go for the defendant, that amount can be cut down very, very materially, and I would think that if this verdict did come in, it could possibly be in the range of $100,000 or $125,000. It could be that, because of the compromising which a jury does, and in addition to that, as I have already pointed out, there is the possibility—although I don't think there is any probability by any means—that it could come in for the defendant, and for that reason I think that this case has a settlement value of about $110,000.

Now, the defendant here must realize that in the first instance at least it will have to pay this $110,000, or whatever figure is finally arrived at. It will have a claim over, of course, against the employer under the indemnity agreement. Just how good that claim over is we can appraise at a later time or we can appraise it right now, but certainly for the purpose of this trial which is about to take place, the defendant here must pick up the check for the entire amount, at least for the time being.

Now Mr. Weston, if counsel for the defendant would recommend to his client that the case be settled for $110,000, would you recommend that to your plaintiff?

MR. WESTON: Well, Your Honor, you must appreciate that I am his attorney and as his attorney I am a schizophrenic. I have a split personality. On the one hand I would like to settle the case because my client needs the money. On the other hand, I don't have many plaintiff's cases and I need publicity. It would do me a lot of good because I am sure to win it. But, because the Court has been so serious and sincere in its efforts to bring this about, and if I am going to have to appear before this Court in future I don't want to be out of step, I will certainly concede some here. I can't recommend $110,000. I have analyzed this thing. I have a low figure in mind beyond which we couldn't go, but I would have to say to counsel on the other side their offer of $40,000 is so ridiculous that I can't even consider taking it to my client, but I am going to, however, reduce my figure to $150,000 in the hope that counsel may realize that they are up against something.

JUDGE WRIGHT: Now, Mr. Phillips, as the insurance company's representative, would you recommend $110,000 to your company if we can get a similar recommendation from plaintiff's counsel?

MR. PHILLIPS: Well, Your Honor, first I would say that it doesn't seem to me that I am called upon to make the recommendation when I have just heard the other counsel say that he wouldn't recommend to his client to accept it.

In the first place, I think the amount of $110,000 is too high. In the second place, I don't see that I have anything to talk to Mr. Snow about when Mr. Weston has just indicated that he won't even make that offer.

JUDGE WRIGHT: Well, considering the hypothetical situation, would you consider discussing the matter with your client, the insurance company, if we could get a recommendation or a consideration of $110,000 by the other side? Would you consider it and would you discuss it with the insurance company?

MR. PHILLIPS: Well, of course, Your Honor,. we will consider any suggestion that you make, but it seems to me that to place the defendant's counsel here in the position of having to discuss something which the plaintiff's lawyer has just said that he would not consider himself, is placing us at an unfair disadvantage. It so happens, Your Honor, that I have Mr. Snow here, the Home Office Counsel, and I would be pleased to have him talk with you.

JUDGE WRIGHT: I take it that counsel for the plaintiff has no objection to Home Office Counsel entering these discussions?

MR. WESTON: On the contrary, Your Honor, he has the money.

MR. SNOW: Your Honor, if Your Honor please, I would liike to talk to my counsel privately.

[Addressing Mr. Phillips] This fellow doesn't sound like one of the big operators. I think he has been reading some books. I was watching him when the judge said $110,000 and he could hardly swallow. I heard a rumor the other day that he had just opened a branch office in Denver and he has been doing a lot of lecturing around the country.

There is one thing I think now we ought to do at this point. I think he has got a very realistic approach to this thing. Frankly, we have got $100,000 here on the file,, and of course we are contemplating–

MR. BUCHANAN: [Impersonating "Danny" and addressing Mr. Weston] I would like to come away from here. They will raise us up to $100,000, so let's keep the bidding open, shall we?

MR. PHILLIPS: [Addressing Mr. Snow] I agree wholeheartedly. I don't believe he knows any of the jurors, either, and I think too, that if we can settle the case, particularly because I have got to live with this judge after you go home–

MR. SNOW: I do understand that.

MR. PHILLIPS: Your Honor, having talked at length with Mr. Snow, having had the benefit of his viewpoint, not only on this case but on many others, which you must surely understand, he has to take

into consideration, he has authorized me to make what I think is a substantial increase in our offer, and has authorized me to submit a proposition of $60,000.

JUDGE WRIGHT: Now Mr. Weston, would you consider discussing with your client this figure of $110,000? If we could get some realistic discussion on it from the other side and consideration from the other side, on such a figure, would you consider discussing that with your client?

MR. WESTON: Well, Your Honor, I am very much interested in Mr. Phillips' remarks. He talked a minute ago about it was useless to talk with his client because I wouldn't consider the $110,000, and then he turns round and comes back with $60,000. It shows of course to me no real desire to be concerned about the injuries to my client and the children and the effect on the children and the mother.

JUDGE WRIGHT: Mr. Weston, it is a little late in the day for that. You can save that for the jury. Let's talk about this $110,000.

MR. WESTON: Well, I think we are where we were before. I wouldn't recommend it and he comes up with $60,000. You know, I have a feeling that he and Mr. Snow have been in a huddle and that privately they have got a figure there that is very much more than $60,000. I know there is a $200,000 policy. You have already advised them that they could lose the full $200,000, although even a compromise verdict—I think you have taken the lowest figure on a compromise verdict when you said $110,000, $125,000. I grant the possibility of a compromise verdict here. I don't think it is probable, but I think there is a possibility, depending, of course, on what happens in the courtroom, but I would certainly do this: if Defense Counsel would show his good faith by really talking in serious terms—they talk about a substantial offer of $60,000. That may be substantial if you have a finger off, but it isn't substantial when you have a foot off and another foot badly crippled and you have also a bad arm and you have lost your livelihood, a livelihood that was remunerative, I don't think it is substantial.

You ask me if I would recommend $110,000. No. I won't recommend it, but I will certainly present it to my client. I owe him that obligation.

JUDGE WRIGHT: I think we are making some progress here.

Mr. Phillips, counsel has indicated that he would certainly consider this $110,000 figure which the Court has suggested and take it up with his client. I was wondering what your reaction to that would be. Would you consider it also and take it up with your client?

MR. PHILLIPS: Well, Your Honor, I can't help but say this to you with complete frankness, that when he said that he would consider $110,000, it really means that he would just jump over the table to get it. My client is not prepared to pay that kind of money, however, in the light of your intense interest in the matter, and knowing that you want to be fair and do the right thing, my only alternative, of course, is to refer the matter back to my client.

JUDGE WRIGHT: Now, I think that is the proper spirit. I think the proper spirit is now being shown by both sides.

Now, Mr. Weston, after considering the matter a little more fully, do you believe that it would be possible for you to make a recommendation concerning the matter, to your client? In other words, suppose we can get Mr. Phillips here to recommend this $110,000 to his client without any commitment that his client would take it, and without any commitment on you that your client would take it, would you recommend it, this $110,000, to your client if he, as a lawyer, at this table here, commits himself to recommend it?

MR. WESTON: Well, Your Honor, my daddy told me never to buy a pig in a poke and it seems to me that until counsel for the defendant indicates a willingness to recommend it, I am simply in a position where he will do what I will do, that is, he will report that to his client. May I confer with my client a moment here?

JUDGE WRIGHT: Yes.

MR. WESTON: [Addressing Mr. Buchanan] Tell your wife not to worry. We will get you settled all right. Are the kids out there ready to come in?

MR. BUCHANAN: (Impersonating Danny) Yes. Are they really going to pay us $110,000? [Laughter] I am not mad at anybody. Let's take it and go.

MR. WESTON: You understand, of course, that you have to pay a fee out of that?

MR. BUCHANAN ("Danny"): That's all right. I will pay you anything you want. Let's take the $110,000.

MR. WESTON: Anything?

MR. BUCHANAN ("Danny"): Well, we have an agreement.

MR. WESTON: Well, Your Honor, I have conferred with Danny. He is anxious to see his wife and kids taken care of and he doesn't want to gamble too far. Everything has been explained to him. I have told him about the $110,000 and he has told me that he would take it if they will accept it, although he isn't very happy about it. [Laughter]

JUDGE WRIGHT: Now, Mr. Phillips, counsel here indicates that he may be able to get you a firm offer of $110,000 to settle this case. Will you recommend that to your client?

MR. PHILLIPS: Your Honor, from the very outset we have just struck on one figure of $110,000—I certainly don't mean this in any criticism, but it seems to me it has just been pulled out of the air. I don't see the magic in $110,000. I agree, now we have reached a point where we are engaging in some negotiation, but it has been obvious to me throughout this conference that Mr. Weston feels that $110,000 is even too much for his client, and I don't see the fairness, Your Honor, of your insisting that we pay more than the claimant's lawyer himself realizes that this case is worth. Nevertheless, I will talk about this to Mr. Snow again and present the matter to him.

MR. SNOW: [Addressing Mr. Phillips] Well, Tom, I don't think we should lose the opportunity of settling this case. I think what we ought to do is keep it open. What has been your experience with this judge? I mean, you have been talking about $110,000. Will he back down?

MR. PHILLIPS: [Addressing Mr. Snow] Well, my own experience is that when he gets something in his head, it is generally like pulling eye teeth to get it out. [Laughter]

I am not worrying, Gordon, about Weston now, but I am concerned about the judge. He has reached up in the sky, as we were saying, and drug down this figure of $110,000, and it is quite obvious that the plaintiff's lawyer wants that sum of money, and yet the judge has shown no disposition to talk of anything cheaper.

MR. SNOW: (To Mr. Phillips) Why don't we make a counter-offer right close to $100,000 and see if we can't get it for $100,000?

MR. PHILLIPS: (To Mr. Snow) Well, having dealt with this particular judge before, I think probably if we made an offer above $100,000 we might have a chance of getting it through. Therefore I would propose that we submit as our last offer the sum of $105,000.

MR. SNOW: (To Mr. Phillips) Well, Tom, I would like to see it settled at that figure. It is a lot of money but we can get out of it, and we will get the case out of the way.

MR. PHILLIPS: Your Honor, as a last gesture, and leaving off any pretense, if there has been any heretofore, and doing what we think is the very limit to the best of our ability, we can raise $105,000 and that is all. If that is interesting to Mr. Weston, we will pay that, otherwise we are prepared to try it.

JUDGE WRIGHT: Well, that seems to be a very generous offer. It is getting very close to where the case should be settled and, frankly, where the plaintiff's counsel should consider seriously taking a little off his own fee (loud laughter) in order to settle the case.

Now, Mr. Weston, we have a $105,000 firm offer, and I believe that, in fairness to your client and fairness to yourself, you should consider that that is a final offer and sacrifice, as I have indicated before, some small part of your fee in order to bring reality to this plaintiff, for otherwise at the present time he has only a hope of getting a large substantial verdict. What is your view?

MR. WESTON: In the first place, Your Honor, my view is that I don't know why I should sacrifice any of my fee unless defense counsel is willing to cut his fee. I understand his client is always complaining about defense fees [laughter] and it seems to me that if he is willing to cut off $5,000 of that amount he is going to charge if he tries this case, that then we can get up to $110,000. I might point this out that I started with $175,000 based upon a scientific appraisal of this case, and, Your Honor, I don't know, you have probably seen my case evaluation sheets [handing them to Judge Wright] here, and you might quarrel with the figure that I have picked that I think the verdict will bring, and yet I think my figure is lower than what you said the verdict might bring. You said $200,000. I offered $175,000. Then you suggested $110,000. That is $65,000 less than my offer. Now, they started with $40,000. Now they are up to $105,000. They have increased $65,000. They have got more money than Danny has, and I

think they ought to pay at $110,000, but I want to talk with Danny. It is his money and his life and his kids. Danny!

Danny, now they are going to chisel us down a little bit more. Actually, I want you to know that, as I think I told you before you came into court, we studied this carefully and scientifically—

MR. BUCHANAN: [Impersonating "Danny"] The first time I saw you when you came to the hospital you told me [laughter] that I would get $8,000 times 47 years for me and you were going to get the rest for you. Well, if you think I have only got $105,000 coming, well, just go ahead, and I will get a lawyer next time who will do right for me. [Laughter]

MR. WESTON: Well, Your Honor. I have talked with Danny and it looks as thaugh I have lost a client. Apparently he is planning to get hurt again and then he is not going to come to me.

I think I ought to say this, Your Honor. The reason that I thought your figure of $110,000 was fair was because one of my competitors settled a case for $105,000, which was the highest settlement ever obtained in your Court, and I want to outdo him. I still think $110,000 is fair, but Danny says $105,000. At least that equals my competitor, so we will accept the $105,000 very reluctantly, very reluctantly.

JUDGE WRIGHT: Well, gentlemen, I think you have done a service to both your clients and I think that your cooperative approach to this problem has been in the interests of justice. We will discharge the jury. [Applause]

Report Of Financial Responsibility Committee—1956

JAMES B. DONOVAN, *Chairman*
New York, N. Y.

ONE of the most significant events in recent legislative history was the enactment by the New York Legislature this year of a compulsory automobile liability insurance law entitled "Motor Vehicle Financial Security Act."[1] Governor Harriman signed the bill into law on April 16, 1956. No longer will Massachusetts stand alone as the only state having a compulsory law.

It is to be anticipated that some of the forty-five state legislatures meeting in regular session in 1957 will consider compulsory automobile liability insurance legislation. Your committee therefore decided that its report this year should be devoted to a factual presentation of the New York law and a comparison of that law with the Massachusetts law which preceded it by exactly thirty years.

The New York law will become effective February 1, 1957, except that the provisions relating to registration of motor vehicles and to promulgation of regulations will become effective October 1, 1956, and shall apply to registration of motor vehicles for registration years commencing on or after January 1, 1957.

The New York law will apply to all owners of motor vehicles registered in the state and to all owners and operators of motor vehicles used in the state, whether resident or non-resident. For the registration year commencing January 1, 1957, every application for registration of a motor vehicle must be accompanied by "proof of financial security" to be evidenced by a certificate of insurance with limits of $10,000/$20,000 for personal injury and $5,000 for property damage, or by evidence of a financial security bond with similar limits, or by a financial security deposit of $25,000 in cash or securities, or by self-insurance qualification.

After 1957, an application for *renewal* of registration need be accompanied only by a certificate of registration or renewal stub in force immediately preceding the date of application and by a statement by the applicant certifying that required proof of financial security is in effect. New registrants will, however, be required to file a certificate of insurance or other evidence of financial security.

If a certificate of insurance is filed as evidence of financial security, the policy which is certified need not be coterminous with the registration period. This is in contrast with the Massachusetts law under

[1] Article 6-A, Vehicle and Traffic Law, as added by Chapter 655, Laws of 1956.

which the policy is required to be coterminous with the registration period. Under the New York law, the policy is to provide coverage, subject to the aforementioned limits, in New York or elsewhere in the United States (exclusive of Alaska) and the Dominion of Canada. The Massachusetts law, on the other hand, requires coverage only on the highways of the state. Furthermore, the New York policy is to provide minimum coverage, prescribed in a regulation to be promulgated by the Superintendent of Insurance, after consultation with all automobile insurance carriers licensed in the state, at least 90 days prior to the effective date of the law. Such provisions shall not fail to reflect "the provisions of automobile liability insurance policies, other than motor vehicle liability policies as defined in [the Financial Responsibility Law], issued within the state at the date of such regulation or amendment thereof." The required policy under the Massachusetts law is an "absolute" policy.

No insurance policy certified under the New York law may be terminated by cancellation or failure to renew by the insurer until at least 10 days after mailing notice of termination to the insured, and the effective date and hour of termination stated in the notice becomes the end of the policy period. Upon cancellation or failure to renew, notice thereof is to be filed by the insurer with the Commisioner of Motor Vehicles within 30 days following the effective date of such cancellation or failure to renew. Operation of the motor vehicle with knowledge that it is not covered by proof of financial security results in revocation of driver's license and registration in case of a resident, and revocation of the privilege to operate a vehicle in the state, in case of a non-resident. Operation in New York of a New York registered motor vehicle with the knowledge that it is not covered by proof of financial security also constitutes a misdemeanor.

The cost of administering the New York law is assessed against all insurers writing automobile liability insurance in the state. By contrast, the cost of administering the Massachusetts law comes from general revenue funds. This New York assessment against insurers imposes an additional financial burden, inasmuch as the cost of the Financial Responsibility Law, which is not repealed by the compulsory law, is also assessed against insurers.

Another marked difference between the Massachusetts law and the New York law is that, in the case of Massachusetts, insurance rates are fixed by the Insurance Commissioner and are promulgated by him every fall following a public hearing. The New York law makes no specific changes in the laws relating to regulation of motor vehicle liability insurance rates, and provides specifically in its purpose section that nothing in the compulsory law is to affect the application of the rating law.[2]

Although many segments of the insurance industry vigorously opposed the enactment of the compulsory law in New York, now that the law has been passed they have indicated their readiness to give full cooperation to New York public authorities in an effort to assure effective operation of the law.

Respectfully submitted,

James B. Donovan, *Chairman;* Marcus Abramson, *Vice-Chairman;* Francis Van Orman, *Ex-Officio;* Harold S. Baile, W. Neal Baird, Palmer Benson, Joseph P. Craugh, Frank J. Creede, James Dempsey, Herbert F. Dimond, Robert L. Earnest, Edgar Fenton, T. Paine Kelly, Jr., Wiley E. Mayne, Henry S. Moser, William G. Pickrel, Warren G. Reed, H. Beale Rollins.

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[2] "Nothing in this article shall be construed to effect any change in the application of article eight of the insurance law to automobile liability insurance rate-making or to affect the development of various methods of doing or operating an automobile liability insurance business." Sec. 93, Article 6-A, New York Vehicle & Traffic Law.

From The Editor's Notebook

In this column, from time to time, the Editor proposes to publish news and views that he believes will be of interest to our members. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed.

Members of I.A.I.C. are cordially invited to submit material for this column. If and when you have views to express on insurance and legal subjects, or when you learn of items of news that you believe of general interest, send them in! As space permits, we'll publish them with credit to you as the contributors.

THE case of *Indian Towing Co. v. United States*, 350 U. S. 61, 100 L. Ed. 83, 76S. Ct. 122, reported in "Interesting Reading" in this issue of the Journal, is unusual because the Supreme Court granted one of its rare rehearings. The Court had divided 4 to 4 on the first hearing. Prior to reargument, Mr. Justice Harlan joined the court. The final decision was 5 to 4. Richard B. Montgomery, New Orleans, La., who appeared for the petitioners, points out that, as a result of this case, the Supreme Court denied a writ of certiorari in *Eastern Airlines, Inc. v. Union Trust Company, et al.*, (C.A.D.C.) 221 F. 2d 62, which was the case wherein a Bolivian pilot collided with an Eastern airliner and the U. S. Court of Appeals held in favor of Eastern on the ground of the negligence of a government employee in the control tower at the airport. Dick says, "It seems that the Federal Tort Claims Act is now available for all suits which do not fall within the exceptions specifically set out in the act."

* * *

DO YOU CITE the Insurance Counsel Journal in your briefs? Many of the members of our Association tell us that they obtain priceless material from Journal articles for use in memoranda and briefs submitted in their litigated cases and in opinions to their clients. But do they cite the Journal as the source of that material?

As the result of the action taken by the Executive Committee during the past three years, the Journal is now in the libraries of most of the federal judges, the courts of last resort of the several states, and the law schools that are members of the Association of American Law Schools. Also, about 1800 copies go to our members and to insurance company subscribers.

With the Journal so accessible, it is to your advantage to cite it as authority.
Don't overlook this opportunity!

* * *

CLARENCE W. HEYL, Peoria, Ill., twenty-five year member of I.A.I.C., received the honorary degree of doctor of laws at the June 3 commencement exercises of Illinois Wesleyan University, where he earned his law degree. Since he joined I.A.I.C. on May 11, 1931, Mr. Heyl has served on numerous committees and has written several articles for the Journal. He is a past president of the Illinois State Bar Association.

* * *

BINDERS for the Journal, offered to our membership last May, have met with an excellent response. Several hundred "standing orders" have been received, whereby a binder will be supplied each January for the issues of the Journal to be published in that year. Also a large number of binders for back issues have been ordered and several subscribers and members have ordered back issues of the Journal to complete their sets, now that binders are available. An order blank is enclosed with this issue of the Journal for the use of members who have not ordered their binders.

* * *

THE JOURNAL is exceedingly proud of the articles it is privileged to publish. That applies not only to the excellent papers appearing in this issue, but also to those that have been presented in the past —since 1934—and those we expect to print in the future. They represent a splendid combination of experience and hard work.

It is typical of the loyalty and enthusiam of the members of I.A.I.C. that the busiest trial lawyers, home office counsel and professors on this continent take their time—without material reward —to prepare these articles for the Journal, setting forth so ably their practical experiences and the results of their legal research. We who have the opportunity to read and use this material are indeed fortunate.

At the same time, as our then president, Stanley C. Morris, said at Coronado in 1955, it is "a hallmark of distinction" to be permitted to present an article for the Journal. Such articles certainly take their places in distinguished company.

* * *

THE 29TH ANNUAL CONVENTION—Our 9th at the Greenbrier—brought exactly 900 to the registration desk, presided over so ably by Executive Secretary Blanche Dahinden. This was our largest convention, to date. Members and wives counted 760, juniors 92, and adult guests and wives 48. We were blessed with splendid weather, the program was excellent and the entertainment beyond comparison. In other words, the meeting was a success. The names and home addresses of those in attendance will be in the October issue of the Journal.

* * *

NEW members of our Editorial Staff make their appearances in this issue of the Journal. Regretfully, we note the retirement from editorial labors of Regional Editors Henry W. Nichols (Northeastern) and Miller Manier (Southwestern). Their well-qualified successors are Joseph W. Griffin, of Chicago, and Josh H. Groce, of San Antonio. Also, we welcome as new State Editors, V. C. Enteman (New Jersey) Fred M. Mock (Oklahoma), H. B. Hoffman (Montana), J. L. Eberle (Idaho), H. Gayle Weller (Colorado), John B. Thurman (Arkansas), Arthur J. Stanely, Jr. (Kansas), and Pearce C. Rodey (New Mexico). They anticipate your cooperation in endeavoring to make the Journal ever more useful to its readers.

INTERESTING READING*

Suggested by

MILLER MANIER**
Nashville, Tennessee

EQUITABLE LIENS FOR FAILURE TO COMPLY WITH FINANCIAL RESPONSIBILITY LAW

Turner v. Harris, Tenn., 281 S.W. 2d 661.

The victim of an automobile accident has lost her battle to subject the realty of the other party to the accident to an equitable lien to require compliance with the Financial Responsibility Law.

The other motorist's automobile was not covered by public liability insurance at the time of accident but the motorist owned substantial real property. Upon the motorist's failure to comply with the Financial Responsibility Law, the victim sought an injunction restraining the transferring or encumbering of the property. The Supreme Court of Tennessee, Neil, C. J., held that it was without power to provide a remedy in addition to those found in the law and said that such a situation disclosed the need for further remedial legislation in this field.

FATAL SUNSTROKE WITHIN ACCIDENTAL DEATH POLICY

Raley v. Life & Cas. Ins. Co. of Tenn., D.C.Mun.App., 117 A.2d 110.

The District of Columbia must now be counted among those jurisdictions which permit recovery for death by sunstroke under a policy insuring against loss of life through accidental means. The Municipal Court of Appeals for the District of Columbia, in reaching this conclusion, was influenced by a prior decision which the court characterized as a workmen's compensation case. The court stated, "While we recognize that these are two different fields of insurance law, we cannot agree that for the purpose of the single question before us there is any reason in logic or common sense for applying a stricter rule in one than in the other. In both situations the same basic test applies in determining whether an 'accidental means' produced the fatality." Opinion by Cayton, C. J.

LEAVING KEYS IN IGNITION NOT NEGLIGENCE

Gower v. Lamb, Mo. App., 282 S.W.2d 867.

The St. Louis Court of Appeals of Missouri has had the latest occasion to pass upon the liability of a motorist who leaves the key in the ignition for injuries sustained while the automobile is being driven by a thief.

Plaintiff argued in the alternative that the motorist was guilty of common law negligence or statutory negligence. A statute in that state provides that it shall be unlawful to leave the key in an automobile ignition but also provides that such act shall have no bearing in any civil action. In view of this broad exclusionary language, the court was of the opinion that a violation of the statute did not constitute negligence per se. On the common law negligence question, the court said, "• • • defendant was under no duty to discover the presence of a thief or thieves in the vicinity where he parked his car, and • • • there was no fact stipulated which pointed to actual knowledge by defendant in the presence of a thief or of thieves in the vicinity. We hold that as a matter of law plaintiff failed to adduce sufficient evidence of negligence or of proximate causation to make a submissible case." Opinion by Franklin Ferriss, special judge.

NEW YORK BUSINESS RECORDS ACT CONSTRUED

Williams v. Alexander, N.Y., 129 N.E. 2d 417.

While the question has often been decided in other jurisdictions, only recently has the Court of Appeals of New York stated its position as to whether a hospital record showing the manner in which an

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accident happened is admissible under the Business Records Act. In the instant case it was the injured plaintiff who sought to keep the record out of evidence. Plaintiff had introduced so much of the record as bore upon his injuries and their treatment but objected to defendant's offering the balance of the record containing a statement allegedly made by plaintiff to the doctor that he was injured when an automobile ran into defendant's automobile causing it to strike plaintiff. This was offered in support of defendant's contention that he was at a standstill waiting for plaintiff to cross the intersection.

The court, speaking through Fuld, J., said that, "* * * a memorandum made in a hospital record of acts or occurrences leading to the patient's hospitalization—such as a narration of the accident causing the injury—not germane to diagnosis or treatment, is not admissible * * *" under the Act. The admission of such evidence required a new trial. Desmond, Dye and Burke, JJ., dissented.

LIABILITY POLICY MODIFICATION FREE FROM ATTACK BY ADDITIONAL INSURED

Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co., Iowa, 73 N.W.2d 22.

The Supreme Court of Iowa has reasoned that one for whose potential or contingent benefit a contract is made may not assert fraud, mistake and lack of consideration in a modification of it by the original parties entered into before his rights under the original contract arose.

Defendant insurance company had issued a liability policy which included a provision covering persons driving named insured's automobile with his consent. Plaintiff company had issued a policy to the son of the automobile owner covering the son during his use of an automobile not owned by him. Prior to the collision which occurred while the son was driving his father's automobile, defendant and the father had modified their liability policy excluding the son from its coverage. Plaintiff sought a declaratory judgment to the effect that the insurance companies were proportionately liable for losses arising from the collision, and asserted that the modification of defendant's policy was ineffective because not assented to by the son and because the father had agreed to it through mistake and induced by fraud.

The supreme court, Smith, J., rejected plaintiff's argument on the ground that at the time of the collision the son was no longer a third party beneficiary. Even if fraud or mistake were present, the court said, the son would have been bound by the terms of the policy as they stood at the time of the collision. The fact that the father a few days after the accident gave notice to rescind the modification agreement was not of aid to plaintiff.

DOUBLE INDEMNITY DOUBLES BENEFITS, NOT PERIOD

Liner v. Penn. Mut. Life Ins. Co., A.D. 145 N.Y.S.2d 560.

"'Double Indemnity' means twice as much, not twice as long," said the Supreme Court, Appellate Division, of New York in an action for declaratory judgment to determine the manner in which double indemnity benefits of life policies should be paid. The beneficiaries contended that the amounts subject to annual withdrawal under the policies should be doubled whereas the insurer contended that the double indemnity provisions increased the principal sums of the policies but did not change the withdrawal privileges. The court in reaching its conclusion was influenced by the fact that insured obviously desired to protect his children during the first 20 years of their lives and to insure that they would receive college educations. This period, the court said, would not vary according to the manner in which insured met his death; therefore, the proceeds were payable during this contemplated period, rather than an extended period. The court also noted that a supplemental agreement concerning payment of double indemnity benefits provided they would be paid "in addition to and together with" the basic proceeds. Opinion by Vaughan, J.

GOVERNMENT LIABLE IN TORT FOR FAULTY LIGHTHOUSE SERVICE

Indian Towing Co. v. U. S., U.S.La., 76 S.Ct. 122.

The Supreme Court of United States has recently clarified one aspect of the liability of the government under the Federal Tort Claims Act, 28 U.S.C.A. § 1346 (b). A tug while pulling a barge went aground allegedly because of the failure of a lighthouse which was operated by the Coast Guard. The court said that the Coast Guard need not undertake the lighthouse service but once it did it had a duty to see that the light was kept in good working order and if the light did become extinguished, the Coast Guard had the further duty to discover that fact and to repair the light or give warning that it was not functioning. The court stated, "* * * it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." Opinion by Mr. Justice Frankfurter. Mr. Justice Reed, Mr. Justice Burton, Mr. Justice Clark and Mr. Justice Minton dissented.

CHILD RECOVERS FOR IMPAIRMENT OF FAMILY RELATIONSHIP

Scruggs v. Meredith, U.S.D.C.D. Hawaii, 134 F.Supp. 868.

From the United States District Court for the District of Hawaii comes a decision upholding the right of a minor child to recover for the impairment of rights arising out of the family relationship which have been destroyed or defeated by the wrong-doing third party. The cause of action was based upon personal injuries sustained by the child's mother and sought damages for loss of support, maintenance, education, nurture, care, training, attention, acts of kindness, comfort and solace. The court, McLaughlin, Chief Judge, reviewed the common law and statutory law of the District and concluded that it indicated an intent to protect all legal interests of the family. While the cases reviewed were wrongful death cases, the court was of the opinion that redress could be had for a temporary impairment as well as for total destruction of a right incident to the family relationship.

Charitable Institution Defense Abrogated In Ohio

WILLIAM E. KNEPPER*
Columbus, Ohio

ON the 18th day of this month of July, 1956, the weakening "charitable institution defense", which had been established in Ohio law since 1911, gasped its feeble last and was more or less tenderly laid to rest by a 5 to 2 decision of the Supreme Court of Ohio.[1] Acting Chief Justice John M. Matthias, who presided at the last rites in place of Chief Justice Carl V. Weygandt, wrote the majority opinion, to which there was a vigorous dissent by two judges of the Court of Appeals, who sat by designation for the hearing and determination of this case. Thus Ohio joined the 10 other states that, to date, upon reexamination of their rules on this point, have cast aside the doctrine that an eleemosynary institution is entitled to special consideration in the field of tort law.

In reaching this result, the Ohio court expressly overruled three long-standing decisions of its own[2] and invalidated countless others not specifically referred to. The basis for the decision was that "public policy" no longer demands the retention of this doctrine in Ohio law.

Judge Matthias says, "The question before us is thus refined to whether the reasons for the public policy, which to this point has made nonprofit hospitals immune from liability as to patients who cannot prove negligent selection of servants, still exist, if they ever did.

"The determination of such question involves simply the balancing of two 'rights'. On the one hand there is the well recognized right of nonprofit hospitals to any

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[1] *Avellone v. St. John's Hospital,* 165 Ohio St. 467, 135 N.E. 2d 410.

[2] *Taylor, Admr. v. Protestant Hospital Assn.,* 85 Ohio St., 90, 96 N.E. 1089; *Rudy v. Lakeside Hospital,* 116 Ohio St., 539, 155 N.E. 126; and paragraphs one and two of the syllabus of *Lakeside Hospital v. Kovar, Admr.,* 131 Ohio St., 333, 2 N.E. 2d 857.

benefit and assistance which society and the law can justly allow them—a right which they command by their very nature; and on the other hand we see the right of the individual injured by the negligence of a servant to look for recompense to the master of such servant, under *respondeat superior.*"

The majority opinion then points out "the political cognizance, in the form of legislation, of the social consciousness of present day government," as evidenced by aid for the aged, aid for dependent children, reimbursement to hospitals for indigents injured by motor vehicles, care for crippled children, and poor relief. Attention is also directed to the prevalence of hospitalization insurance, which, in 1955, paid "approximately one-half of the gross charges incurred by patients in American hospitals."

Furthermore, says the majority opinion, "The policy that the funds of a nonprofit hospital should not be diverted for any purpose other than the purpose for which it was organized, causing a depletion of the hospital's resources, and thus immunizing them from liability no longer has any foundation in our present day economy. *Under present day conditions a hospital may fully protect its funds by the use of liability insurance, and, since such funds may be used to recompense those who are injured through the negligent selection of servants and strangers, there is no reason why such funds may not be used in the purchasing of insurance which will protect not only the hospital and its funds but also any person injured through its negligence or the negligence of its servants.*" (Emphasis is the writer's.)

Hastening to explain that the court does not intend to impose a liability heretofore nonexistent merely because it may be indemnified by insurance, the majority opinion continues:

"What we do find with regard to this aspect is that *the availability of liability insurance* and *the existing power to purchase it with hospital funds,* coupled with *the increased base of remuneration for services rendered* and the *efficient businesslike management of modern hospitals, certainly tend* (preceding emphasis is the writer's) to negate the argument that to hold the hospital amenable, under the doctrine of *respondeat superior,* to damages for injuries to patients caused by the negligence of its servants would be such a detriment as to defeat the charitable purpose for which it was organized and incorporated."

The significance of "the availability of liability insurance,"—standing alone—presents an interesting question as to the attitude of the Ohio court in future cases involving other types of charitable institutions. The court did not expressly overrule *Waddell, a Minor, v. Young Women's Christian Association,* 133 Ohio St., 601, 15 N.E.2d 140, yet that case was based upon the three cases that were expressly overruled by this latest decision. It may well be inquired, what will be the attitude of the Ohio court in cases involving such charitable institutions as churches, denominational or parochial schools, the Boy Scouts, the Girl Scouts, the Salvation Army, the Y.M.C.A., the Y.W.C.A., agencies fully supported by a community chest, and the like?

Perhaps some intimation of that attitude may be found in the court's quotation from the opinion of Judge Rutledge in *President and Directors of Georgetown College v. Hughes,* (C.A.D.C.) 130 F.2d 810, wherein he said:

"Insurance must be carried to guard against liability to strangers. Adding beneficiaries cannot greatly increase the risk or the premium. This slight additional expense cannot have the consequences so frequently feared in judicial circles, but so little realized in experience. To offset the expense will be the gains of eliminating another area of what has been called 'protected negligence' and the anomaly that the institutional doer of good asks exemption from responsibility for its wrong, though all others must pay. The incorporated charity should respond as do private individuals, business corporations and others, when it does good in the wrong way." (Emphasis is the writer's.)

The dissenting opinion, in the Ohio case, points out that the *Georgetown College* case was "one of first impression in that court." Judge Putnam says:

"Three of the judges agreed to affirm only because the plaintiff was a stranger to charity. The other three, including Judge Rutledge, placed the affirmative on the broader ground that charities should not be immune as such. Consequently, what is said therein upon this proposition is obiter and efficacious only so far as arguments

are pursuasive. * * * I desire to point out that the arguments of Judge Rutledge failed to convince three members of his own court and also the judges of the highest courts in 20 states."

The same judge concludes his dissenting opinion with this pungent statement:

"I feel that this decision burns down a good barn of solid construction and many compartments in order to eliminate a few rats in one compartment, which may be destroyed by other methods less drastic and more wise."

Finally, however, it should be observed that the majority opinion clearly limits the rule stated to the proposition presented by the demurrer to the "charitable institution defense" set forth in the answer. Judge Matthias says:

"For instance, we are not deciding that persons working in a hospital, such as doctors and nurses, under circumstances where the hospital has no authority or right of control over them, can bind the hospital by their negligent actions. See *Schloendorf v. Society of New York Hospital,* 211 N.Y., 125, 105 N.E., 92, 52 L.R.A. (N.S.)505.

"The present case has to do only with the pleadings and does not extend beyond the question of the liability of a hospital for the negligence of those employees who can and do make the hospital answerable for their actions under the doctrine of *respondeat superior.*"

Declaratory Judgment Actions — — Automobile Insurer v. General Liability Insurer*

By R. H. Anderson
Wausaw, Wisconsin

THE case of *Pacific Employers Insurance Company v. Hartford Accident and Indemnity Company,* 228 F.2d 365 (California, 1955) is an example of how the declaratory judgment procedure may be used to force an automobile insurer to assume its liability as a primary insurer, where both a general liability policy and an automobile policy of another insurer are in effect.

The facts of the case are as follows: The Wm. T. Neil Company was in the construction business. Neil and another contractor were both working on the same construction project, Neil doing the grading and leveling work. Neil used dump trucks to haul and dump the earth fill, and provided a flagman to work with the truck drivers. While dumping a load of fill, due to the combined negligence of Neil's driver and flagman, a large rock rolled into the area where the other contractor's employees were working, and injured one of the employees.

Neil had both automobile and general liability insurance. The automobile insurance was carried by Hartford Accident and Indemnity Co. The general liability insurance was with Pacific Employers Insurance Co.

The injured employee sued Neil for damages in a California state court. While that action was pending, Hartford (the auto carrier) sued Pacific in federal court for a declaratory judgment to determine the respective liabilities under their policies. Thereafter, the state court action was settled by the two insurers under an agreement preserving their rights in the declaratory judgment action.

The main issue in the declaratory judgment action was whether Hartford and Pacific were liable as co-insurers, or whether Hartford (the auto carrier) was liable as the primary insurer, and Pacific only secondarily liable. As stated in the decision:

"Pacific's theory is that where two insurer's cover a given risk, but one policy provides extended coverage so as to insure the ultimately liable individuals, while the other covers only the named insured, whose liability is vicarious, and the named insured has a right of recovery over against the persons primarily or ultimately liable, then the insurer of

*Contributed by J. Mearl Sweitzer, Wausaw, Wis.

the named insured is subrogated to the rights of the named insured and has a right of recovery against those ultimately liable and against the insurer providing extended coverage.

"Explained in terms of the present controversy, Pacific argues that while both policies covered Neil's corporate liability, only Hartford's provides extended coverage to the truck driver and the flagman who were the primarily liable tort-feasors. Under California law, Neil, liable vicariously through the doctrine of respondeat superior, can recoup his losses from the driver and the flagman. Pacific, as insurer of Neil only, and under its rights of subrogation, can recover from Hartford who also insured the negligent driver and flagman."

The court accepted as supporting Pacific's position the three cases of: *United Pacific Insurance Co. v. Ohio Casualty Insurance Co.*, 9 Cir., 1949, 172 F.2d 836; *Canadian Indemnity Co. v. U. S. Fidelity and Guaranty Co.*, 9 Cir., 1954, 213 F.2d 658, and *Maryland Casualty Co. v. Employers Mutual Liability Insurance Co.*, 2 Cir., 1953, 208 F.2d 731. After discussing these cases, the court said:

"The effect of these cases, or the rule to be drawn from them, may be stated in this way: An insurer providing extended coverage is ultimately liable as against an insurer providing coverage only to the named insured, where the named insured's liability is vicarious only, and that named insured has a right of recovery over against the person or persons primarily liable, to whom coverage has been extended only by the extended coverage provision of the first insurer."

The court held that both policies covered the corporate liability of Neil, and further held:

1. The cause of the injury was the negligence of the truck driver and flagman in unloading the truck.

2. Neil was liable under the doctrine of *respondeat superior*.

3. Neil was entitled to recovery over against the truck driver and flagman.

4. The truck driver and flagman were covered by the Hartford (automobile) policy, as omnibus insureds, thereby putting the ultimate liability on Hartford.

5. Pacific (general liability insurer) had the same rights against the truck driver and flagman as Neil, by virtue of subrogation.

6. Therefore, as between Pacific and Hartford, Hartford is liable as primary insurer.

Hartford objected to the jurisdiction of the court to determine the issues of negligence and of Neil's right to recovery over against his truck driver and flagman. It took the position that the only question properly before the court in this action was the respective liabilities of the two insurers with respect to the liability of Neil. The court discussed this point as follows:

"Neil has never proceeded against the negligent driver or flagman for contribution for their wrongful acts. But such is not necessary under the three cited cases, supra. Those decisions remove the need for proceeding through the tangle of claims involved to determine ultimate liability. Both the United and Maryland Casualty cases speak in terms of avoiding multiplicity of suits or circuity of action. The relief sought in a declaratory judgment action of this nature is broad enough to allow the court to settle all issues without forcing the parties to proceed separately against those who may be liable. In the United case, both parties stipulated and agreed to have all potential issues decided in the single action; in this case no such stipulation was made, but Hartford's complaint, we b e l i e v e, is expansive enough to allow this court to decide all necessary issues to a final determination of the matter. . . . Even more persuasive is the fact that to render a declaratory judgment in this case, the court must inquire into the respective liabilities of all the parties. The trial judge was well aware of this in making his findings of fact and conclusions of law which went beyond the mere declaration of the rights of the two insurers. His judgment took into consideration the liability of Neil's employees . . . and the rights of Neil to proceed against them, and we will consider all the aspects of the controversy in reaching our decision."

Bailee Losses

T. W. Booth*
New York, New York

THE adjustment of losses under a policy issued to a bailee covering either his liability as a bailee, or covering the property of others in his possession, is not limited to any one branch of the insurance industry. Such contracts are issued by fire, casualty and inland marine underwriters on an ever increasing scale. It would be virtually impossible to list all such policies but you will find this coverage under fire policies with the trust and commission clause, burglary policies, bailee customer's policies, and jeweler's block policies to mention but a few.

Unless you have had the misfortune of being involved in a major bailee loss you may not have any conception of the magnitude such a loss can reach. Probably the largest such loss was one that occurred eleven years ago under a furrier's customer's policy which involved 27,000 fur garments belonging to as many owners.[1] That loss cost the underwriters about $2,700,000. A loss of such proportions involving that many claimants puts the entire industry on trial from a public relations point of view and requires the same careful planning that the industry has come to use when a bad windstorm occurs.

Before discussing adjustment procedures it might be well to examine the rights of the parties, that is to say the rights of the bailee insured, his insurer and his customers under a bailee policy. There are almost as many definitions of the term bailment as there are cases on the subject and, without getting into the various types and kinds of bailments, we can say that when personal property has been delivered to a person for a certain purpose and is to be returned or delivered to someone else when that purpose has been accomplished, a bailment has been created.[2] The one having possession of the property is the bailee and the one who entrusts the property is the bailor.

There is no question but that a bailee can insure property of others to its full value,[3] and in the event of a loss he may maintain an action against his insurer holding the proceeds in trust for his customers.[4] The problem is not quite so easily resolved, however, when we consider the rights of bailors, the insured's customers, under a policy taken out for their benefit.

Third Party Beneficiary

Generally speaking, a stranger to a contract may not enforce it. There is an exception to this general rule known as the third party beneficiary rule, which permits a person to enforce in his own name a contract made by others for his benefit. Like all exceptions to a general principle of law, there are jurisdictions that have not adopted the exception, and some have adopted it with modifications. As a matter of fact, the third party rule has been a prolific source of judicial and academic discussion[5] almost as far back as 1677 when it was first enunciated in England[6] only to be reversed by later decisions.[7] Our own courts have experienced similar difficulties as evidenced by the decisions in Massachusetts. At one time a beneficiary could maintain an action, but subsequent decisions have reverted to the old rule.[8] Even in states which by statute permit third party suits there is uncertainty in the decisions.[9]

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*General Adjuster, America Fore Insurance Group. This article was originally the subject of a speech given by Mr. Booth to the Loss Executives Association. The article was prepared for the Fire and Inland Marine Committee.

[1] Yale Cold Storage Corp. loss, New Haven, Conn.

[2] Williston on Contracts, Vol. II, Sect. 1032; Bouvier's Law Dictionary, Rowle's 3rd Ed.

[3] *California Insurance Co. v. Union Compress Co.*, 133 U.S. 389, 33 L. Ed. 730; *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U.S. 527, 23 L. Ed. 868; *Automobile Ins. Co. v. Springfield Dyeing Co. Inc.*, 109 F. 2d 533, 2 F&CC 96; Couch on Insurance, Sect. 360, 1934; Fletcher, John L. "Liability of Bailee and His Insurer" Best's Fire & Cas. News, Nov., 1944.

[4] Couch, *supra; Gardner v. Freystown Mutual Fire Ins. Co.*, 350 Pa. 1, 154 A.L.R. 1351; *California Ins. Co. v. Union Compress Co., supra; Home Ins. Co. v. Baltimore Warehouse Co., supra.*

[5] *Seaver v. Ransom*, 224 N.Y. 233, 236.

[6] *Dutton v. Poole*, 2 Lev. 211, Keener's Cases on Contracts, 3rd Ed.

[7] *Price v. Easton*, 4 B & A 393, Keener's Cases, *supra; Tweddle v. Atkinson*, 1 Best & Smith 393, Keener's Cases, *supra.*

[8] *Mellon v. Whipple*, 1 Gray 317, Keener's Cases, *supra; Everett Factors & Terminal Corp. v. Oldetyme Distillers*, 300 Mass. 499, 118 A.L.R. 965, 81 A.L.R. 1273.

[9] Note 13, *infra.*

Some of our courts have indulged in a variety of legal fictions in order to follow the rule, but whatever the rationale substantial justice is seemingly accomplished by permitting one for whose benefit a contract is made to enforce it in his own name even though he was not a party to the contract, paid no consideration for it and may not even have known of its existence when the contract was entered into. If such suits were not permitted, and the bailee insured refused to press the bailor's claim, the bailor would be without a remedy. In just such a case, the New York Court of Appeals said, "Such lapses the law seeks to avoid."[10]

Despite the difficulties some of our courts have experienced with the rule, the prevailing view permits a third party to adopt a policy of insurance taken out for his benefit, although there are some notable exceptions, including Massachusetts, Michigan and New Jersey.[11] In New Jersey third party suits are permitted by statute[12] yet it would appear from the decisions that unless the bailor was named in the policy, or a certificate of insurance issued to him, or that the insurance was carried pursuant to an agreement or that the bailor paid the premium and had express knowledge of the policy, the beneficiary may not enforce the policy.[13]

It is well that we understand the nature of a beneficiary's rights under a policy of insurance taken out for his benefit. His rights are derivative, that is to say his rights are derived solely from the policy itself and thus he is bound by the terms, limits and conditions of that policy.[14] If the policy is conditional, voidable or unenforceable, he is bound thereby[15] and of course unless there is a valid contract no rights or benefits can accrue to anyone.[16] It follows, therefore, that if the policy is valid yet subject to such equitable defenses as fraud, mistake or failure of consideration, the beneficiary may not recover.[17]

Warshaw Case

For example, in a case where the insured failed to keep his trucks attended as required by the policy, the owners of the cargo could not recover under the trucker's policy.[18] The rule was well stated by the court in *H. Warshaw & Son v. Standard Insurance Co.* as follows, "If the bailee could not have avoided the terms of its express contract with its own insurer, it is difficult to perceive why the bailor should have any greater measure of recovery under the same instrument."[19]

Although the Warshaw case enunciates the general rule, care must be exercised in those cases where the bailee takes out insurance pursuant to a statute. In Kansas, for example, the operator of a grain elevator is required to maintain insurance for the benefit of his bailors and his failure to do so will render him liable on his bond. Under this statute the Kansas courts have held that the bailee insurer is liable to the holders of warehouse receipts despite the fact that the bailee set fire to the premises and was convicted of arson.[20] The court said that the bailors were parties to the contract and thus the arson was no defense. The case is not sound because of the court's failure to distinguish between an independent cause of action, which a third party admittedly has, and an independent contract which obviously the parties, insurer, bailee or bailor never intended. If the bailors were parties to the contract it follows that the insurer could not cancel or modify the contract without the assent of the holders of warehouse receipts, whose identities he could not possibly ascertain. It is submitted that such a result is untenable.

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[10] *B. H. Exton v. Home Fire & Marine Ins. Co.*, 249 N.Y. 258, 61 A.L.R. 718, 720.

[11] Williston on Contracts, Rev. Ed., Sect. 368, 81 A.L.R. 1279, et seq.

[12] N.J. S. 2A; 15-A.

[13] *Crown Fabrics Corp. v. Northern Assurance Co.*, 124 N.J. L. 27; *Shapiro Brothers Factors Corp. v. Automobile Ins. Co.*, 40 F. Supp. 1; *McMahon v. Alexander Furs Inc.*, 24 N.J. Misc. 208, 48 A. 2d 224; *London Assurance v. Begeleisen*, 135 N.J. L. 564. See also *Old Colony Insurance Co. v. Lampert*, 129 F. Supp. 545 (April 15, 1955) where the U.S. District Court, in the absence of any New Jersey decisions, held that bailors under a policy issued to a bailee "for account of whom it concerns" would be entitled to the proceeds of the policy.

[14] Williston, *supra*, Sect. 364A, 81 A.L.R. 1292; *Savarese v. Ohio Farmers Ins. Co.*, 260 N.Y. 45.

[15] Restatement of Contracts, Section 140; Williston, *supra*, Sect. 397.

[16] Williston, *supra*, Sect. 364A.

[17] Williston, *supra*, Sect. 397.

[18] *Automobile Ins. Co. v. Fixler*, 117 F. 2d 979, Cert. denied 314 U.S. 632.

[19] 27 F. Supp. 974, but see *Michigan Fire and Marine Ins. Co. v. National Surety Corp.*, 156 F. 2d 329, where rights had vested before the defense of arson occurred, thereby permitting the beneficiary to recover.

[20] *Millers National Ins. Co. v. Bunds*, 158 Kan. 662, 153 A.L.R. 176.

Motor Truck Cargo

Motor truck cargo policies issued to interstate motor carriers are good examples of policies issued pursuant to statute where the beneficiary has greater rights than has the named insured. The Interstate Commerce Commission has been empowered by statute to set up certain rules and regulations for the protection of shippers and consignees who move their goods in interstate commerce by motor trucks.[21] One of the requirements is that the trucker provide insurance covering his legal liability as a carrier and that the policy must be endorsed with the Interstate Commerce Commission Cargo Liability Endorsement[22] which provides that no provision, condition, or limitation in the policy shall in any way affect the right of a shipper or consignee to be indemnified for a loss for which the trucker is liable. Similar statutes have been enacted by all but ten states for the protection of shippers and consignees in intra-state commerce.[23]

Although the motor truck cargo policy with the I.C.C. endorsement attached covers only the liability of the insured as a carrier, the New York Court of Appeals has stated that it is in affect a statutory all risk policy for the benefit of shippers and consignees[24] and it has further been held that limitation clauses or breaches of warranties by the trucker are not binding on shippers.[25] Following the third party rule, which we have discussed, it has been held in numerous cases that the shipper or consignee may maintain an action directly against the trucker's insurer.[26]

It is also well to note that the beneficiary's rights under an insurance policy taken out for his benefit are superior to the rights of the named insured's trustee in bankruptcy so that if the insured goes into bankruptcy the proceeds of the bailee policy cannot be paid to the trustee to satisfy general creditors but must be paid to those entitled to the funds, namely the beneficiaries.[27]

Public Relations

We have pointed out that a bad bailee loss puts the entire industry on trial from a public relations point of view because of the difficult problem of handling a vast number of claims arising out of a single fire or other catastrophe. Probably the greatest single step that this industry has taken for the improvement of public relations, and for which this organization can be justly proud for the part it played, was the formulation and adoption of the Agreement of Guiding Principles, whereby the bailee insurer may pay all those claimants who do not have their own personal insurance before recognizing subrogated claims. In this way the greatest possible recovery is made by the public and of course the prompt and fullest possible payment of losses materially facilitates the adjustment of any loss.

The physical problem of handling hundreds of claims is difficult enough for the adjuster and the company but the problem is made far more difficult when limitation clauses must be applied to the claims of many persons who are not familiar with insurance coverages. For example, we are trying to adjust losses today under a clause found in fire policies that had its origin some fifty or seventy-five years ago. The original purpose of the trust and commission clause was to provide coverage for the small merchant who ocassionally had property of others in his possession. Despite the fact that our economy has materially changed in the last half century, the only significant change that has been made in the clause is the insertion of language that the clause only operates when the insured is legally liable for the loss, and this change is hardly significant in those states where the courts have held that the coverage is for the benefit of bailors regardless of the bailee's liability. All too often the insured

[21] 49 USCA 315.

[22] ICC form BMC 32.

[23] States which have not enacted such legislation are Ariz., Cal., Conn., Del., La., Md., N. J., R. I., Vt., and Wash.

[24] *York Buffalo Motor Express Inc. v. National Fire & Marine Ins. Co.*, 294 N.Y. 467.

[25] *McIntosh v. Whieldon*, 205 S.C. 119, 5 F&CC 299; *Bolta Rubber Co. v. Lowell Trucking Corp., et al.*, 304 Mass. 426, cert. denied 309 U.S. 690.

[26] *Atkin v. National Liberty Ins. Co.*, 5 N.Y.S. 2d 863; *Zucker's Sons Inc. v. Automobile Ins. Co. of Hartford*, 23 N.Y.S. 2d 83; *American Distilling Co. v. New Hampshire Fire Ins. Co.*, 28 N.Y.S. 2d 837; *Mickey Finn Clothes v. Yale Transportation Corp.*, 175 Misc. 242, 23 N.Y.S. 2d 84; *McIntosh v. Whieldon, supra; Lucas v. Garrett*, 6 F&CC 280 (South Carolina); *Great Coastal Express, et al., v. Fidelity & Guaranty Fire Corp.*, 6 F&CC 74 (Maryland Court of Appeals). For a discussion of priority of payment under a Motor Truck Policy with I.C.C. endorsement see *Ward Trucking Co. v. Philadelphia National Ins. Co.*, 67 A. 2d 480, 4 N.J. S. 434.

[27] *Century Insurance Co. v. First National Bank*, 102 F. 2d 726, cert. denied 308 U.S. 70, 84 L. Ed. 478; *Morrison, et al., v. Warren*, 174 Misc. 233, 21 N.Y.S. 2d 988.

is unaware of this clause in his policy and thus does not take out sufficient insurance to satisfy co-insurance or average requirements, and in some instances a bailee, such as warehouseman, may not be able to ascertain the value of customer's goods for insurance purposes, yet when a loss occurs and customer's good are a proper claim under the policy, the insurer has no other alternative but to apply the co-insurance or average clause not only to the insured's own property but also to property of others, all of which makes for a difficulty adjustment and for bad public relations.

In Trust—Co-insurance

When it is realized that floor plan financing of consumer's durable goods alone, exclusive of automobiles, where the lender reserves title to the goods until the debt is paid, approximates two billion dollars annually, we must conclude that the value of goods owned by others in the possession of our policy holders, amounts to several billion dollars a year and that our present trust and commission clause has not kept pace with our changing economy. It is submitted that a person should be able to purchase insurance against his potential liability arising out of the bailor-bailee relationship as a separate item of insurance not subject to co-insurance or average.

Adjustment Cost

The adjustment of a large bailee loss is expensive. An examination of a dozen losses occurring in various parts of the country ranging in amounts from $1,600.00 to $2,500,000.00, where the average payment was $42.13, would indicate that the cost per claim paid, including salvage charges, ranged from $1.00 to $11.00 with an average of $5.58 per claim. The ratio of adjustment expense including salvage charges to the total amounts paid in these claims amounted to 15.7%.

These figures are not presented as a guide to check against adjustment expenses because each individual case will vary, but they do demonstrate that a bad bailee loss is an expensive loss to adjust. This is understandable when it is realized that the adjuster has not only the task of handling the loss with the insured but also with hundreds if not thousands of claimants, including subrogating companies if there is adequate insurance, or if the bailee is legally liable for the property damaged.

Although some bailee policies give the insurer the right to adjust losses and make payment directly to the named insured for account of whom it may concern, the company must act in good faith and exercise caution and sound judgment if it chooses to pay a bailee loss in this manner. If it has the slightest indication that the bailee insured will not discharge his obligation as trustee to his customers properly it may find itself at a later date with the loss being re-opened.[28] Aside from the hazard that the loss may be re-opened, it does not seem quite fair, except in unusual cases, to saddle an insured with the burden of adjusting losses with hundreds of claimants when that is the proper function of the insurer. After a bad loss, the insured has all he can do to rehabilitate his business without having to be bothered with a multitude of claims, to say nothing of the expense entailed which he often can ill afford to bear at that time. In some few cases it is possible for an insurer to pay his loss into the registry of a court and interplead all the claimants who have sustained losses and thus be fully discharged from any further liability under the policy. The underlying and basic thought behind a bill of interpleader is not so much to remove the hazard of a double payment but rather to provide a means whereby a person can defend himself against the vexations of a multitude of claims against the same debt. Thus it is that as a general rule if the insurance is adequate to pay all claims the insurer cannot put his expensive and difficult adjustment problem on the court, for as one court said, "There can be no resort to equity save in case of real necessity and not merely as a convenient escape from duty and labor at the cost of the beneficiaries, generally including fat fees for the insurer's counsel."[29] Where, however, the policy is inadequate it has been held that the insurer, is entitled to the broad protection afforded by the federal interpleader statutes[30] provided of course the prerequisite

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[28] *Hoffman v. Firemen's Fund Indemnity Co.*, 160 Misc. 823, 248 Am. Dec. 866; For a discussion of facility of payment clauses in life insurance policies see exhaustive annotation in 166 A.L.R. 10, et seq.

[29] *Royal Neighbors v. Lawary*, 46 F. 2d 565; *Welch v. Montgomery*, 205 P. 2d 288, 9 A.L.R. 2d 294.

[30] *Century Insurance Co. v. First National Bank*, 102 F. 2d 726, cert. denied 308 U.S. 570, 28 USCA 1335. The same results would probably not obtain in those jurisdictions where the third party rule does not apply.

diversity of citizenship exists and the amount of the policy exceeds $500.00.

That statute also makes it possible for an insurer to have an interest in the results of an interpleader suit, that is to say he can contest his liability under the policy in the same suit where he has paid his money into court and asked the court to disburse the funds.[31] This was not possible at common law and is not permitted in many state courts which still require that the insurer be completely disinterested in the outcome of the interpleader. It is also well to bear in mind that reasonable counsel fees are permitted the insurer from the funds deposited to the registry of the court under the federal interpleader statute.[32]

Claimants

Aside from the cases where the funds are paid directly to the named insured, a procedure which is generally not recommended, and the rare case where the insurer can avail himself of either state or federal interpleader, the loss must be handled directly with the claimants. The methods used in such adjustments are limited only by the ingenuity of the adjuster and the company's loss department. The adjustment procedures will vary depending upon the number of claims, the amount of those claims and the amount of insurance available. If there are only twenty-five or fifty claims and adequate insurance, it would seem that once the company's liability under the policy has been determined the only thing to do is to contact the claimants and adjust each individual loss, allowing the named insured to make payment if he desires and is able and then forward the closing papers, including releases from each claimant and evidence of payment by the insured, to the company so that the insured can be reimbursed or to forward all the papers to the insurer, who can then issue individual drafts to the claimants.

When the claimants run into the hundreds or thousands the problem is not quite so easy. After the loss itself has been well investigated, what is left of the assured's records examined, immediate steps taken to protect and preserve salvage and the insurer's liability determined, plans must be made to handle an influx of claims. If the insured's records show the identity of all claimants, and they usually do not, claims forms are mailed out. When claimants are not known—as is the usual case—the insured and the underwriter may decide to advertise in the press or use the local radio facilities to notify the claimants of the loss and instruct them how to proceed, or they can wait until the claimants themselves come to the bailee for their property. Notices are generally posted at the insured's place of business if he has been forced to vacate because of the fire, telling the claimants where they should go to file their claims.

It is often well worth the expense to set up a temporary office staffed with several adjusters and clerical help to handle these claims because the average adjuster's office does not have the facilities to cope with hundreds or thousands of claimants and, even if it has, the regular run of losses will suffer. The separate claims office has another advantage and that is the effect it has on public relations because it is concrete evidence to the public that upon the happening of a major loss the insurer is doing everything in its power to adjust and pay the claims as promptly as possible. This is what the public has come to expect of the industry, and rightfully so.

Once the plans have been made as to how the claims are to be handled with the insured, and it cannot be emphasized too strongly that the insured's fullest co-operation should be secured because he and only he knows his customers and the quality and value of their property that has been damaged, each claim must be individually handled. It has been estimated that it will take an adjuster one hour on an average to adjust each loss. This takes into consideration the claim that is satisfactorily settled in a few minutes over the telephone and the claim which necessitates several trips to the claimant's home as well as several calls to verify bills that may have been submitted by the claimant.

Depreciation is the adjuster's most difficult task where the loss is to wearing apparel and household goods. Generally the claims filed for these goods are subject to 40% to 60% depreciation with the average nearer to 40%.

Long before the adjustment of the individual claims has taken place, consideration will have been given to the manner in which payment is to be made. If the bailee insured has adequate funds and is willing to do so he can pay the adjusted

[31] *Aetna Insurance Co. v. Dickler, et al.*, 100 F. Supp. 875; *Century Insurance Co. v. First National Bank, supra.*

[32] Note 31, *supra.*

claims upon approval by the adjuster and then be reimbursed by his insurer upon filing of proofs of loss together with releases from each claimant and evidence of his payment. Generally, a bailee does not have adequate working capital to advance these funds, so the company may put him in funds in a joint account with the adjuster and drafts can be drawn to pay the claims upon their joint signature. Another way is to provide the adjuster with company drafts so that the claims can be paid as soon as they are settled. This makes it possible for prompt payment of the claims and also facilitates the adjustment of the claims. Of course, the company must have the fullest confidence in the adjuster to permit him to issue company drafts and care must be exercised by both company and adjuster to see that the drafts are properly safeguarded before issuance and a close check must be kept to match drafts issued against the claim papers which should be in the company's possession before the drafts are presented for payment. This method of payment is not academic but has been used in several major bailee losses with satisfaction.

Inadequate insurance in a bailee loss will do more to destroy good public relations than almost any other factor in the adjustment of losses. It brings about a delayed adjustment, payment of only a portion of each claim, complete dissatisfaction on the part of the claimants and usually a very unhappy and disgruntled insured. If insureds, agents, brokers and underwriters could only experience one of these adjustments, there would be a decided increase in the limits carried by most bailees.

Visualize if you will a cleaning and laundry establishment with a $20,000.00 policy insuring customer's goods. A fire breaks out through no fault of the insured, but his plant is leveled. Fortunately, he has adequate insurance to protect his own property, but he suddenly realizes he has about 1200 to 1500 claims aggregating $75,000 to $90,000, of which about 700, amounting to over $35,000, do not have their own insurance. How can the adjuster and the company handle such a loss and still maintain the high standards our industry has set for the prompt and fair payment of losses? The answer is obvious. They can't.

In just such a case, the company first discussed the loss with its insured and pointed out that there just wasn't enough insurance to cover even the claims of otherwise uninsured claimants and suggested that if the insured could, he should consider putting up funds of his own so that this class of claimant could be satisfied. The insured was not in a position to contribute any funds, so the company had to make other arrangements.

This loss occurred in a state where the third party beneficiary rule does not apply, so the company could not interplead its funds either in the state or federal court even if it so desired. The company had to figure a way of satisfying about $35,000 worth of otherwise uninsured claims with a $20,000.00 policy. After the adjuster was reasonably satisfied that he had the claims from all claimants who did not have their own personal insurance, and this took many months, the claims were totalled. To this total was added a sum to serve as a small cushion to take care of late reported claims. The insurance was then applied to this total and a percentage of recovery was ascertained. A form letter[3] was prepared with the approval of the insured and his attorney and mailed out to

[3]With reference to the loss you sustained in the fire of Date on the Premises of The Cleaners & Dyers, Inc., we wish to inform you that the Blank Insurance Company issued to The Cleaners & Dyers, Inc. a policy for $20,000.00 covering on customers goods. There have been hundreds of claims presented by customers and their claims are greatly in excess of the $20,000.00 limit in the Blank Insurance Company's policy.

Many of the customers whose goods were destroyed carried individual fire insurance and have collected from their own insurance companies. No payment under the Blank Insurance Company's policy will be made to such customers, with the result that the entire $20,000.00 will be available to those customers who did not carry individual insurance.

The claims of those without their own insurance amounting to $_____ against the insurance of $20,000.00 entitles you to payment of $_____. This represents the same percentage of your original claim that each one of the other customers is also being offered. This offer must be accepted by Date and is withdrawn if not accepted by that date.

Will you please sign your name on the line provided in this letter and return it in the enclosed stamped, self-addressed envelope.

Draft in payment will be forwarded upon receipt of signed acceptance at this office.

Yours very truly,
The Cleaners & Dyers, Inc.

_____ Title

Blank Insurance Co.
By_____ Adjuster

I hereby agree to accept $_____in full settlement and release of my claim against The Cleaners & Dyers, Inc. and the Blank Insurance Company resulting from the fire on the premises of The Cleaners & Dyers on Date.

_____ L. S.

all otherwise uninsured claimants. This letter bore not only the signature of the company but also of the insured. The letter recited the fact that there was inadequate insurance to pay all claims and that only those who did not carry their own personal insurance would participate in the bailee's policy. An offer was incorporated in the letter based on each claimant's proportionate share of the policy and a deadline set for the acceptance of the offer. To accept the offer the claimant was required to sign a release which was part of the form letter and return it to the adjuster in an enclosed, stamped, self-addressed envelope.

Immediately upon receipt of the acceptances, the adjuster began drawing drafts which had been supplied to him by the company. To facilitate the issuance of the drafts, the company had them imprinted with the policy number, claim number and other identifying data usually typed out in insurance company drafts. It also took the precaution of having a special release printed on the reverse side of the draft whereby the endorser released the insured and the insurer from any further claim. At the insured's request the drafts were mailed out directly to the payees by the adjuster.

All in all, some 675 drafts were issued by the adjuster which all but exhausted the bailee policy. If the balance had been pro-rated over the claims of subrogating companies, none would have received enough to warrant the expense of filing their claims, so the balance was turned over to the insured to satisfy his earned charges and also to take care of possible future claims. In return the insured executed a hold harmless and indemnity agreement.

When there is adequate bailee insurance the problem of taking care of subrogated claims is a problem in and of itself and we in the claims end of the business are partly to blame. The National Board of Fire Underwriters, upon notification of a bailee loss, will notify all its members of the loss and the name and address of the insured, the name of the adjuster, and the name of the insurer and its policy number. Upon receipt of this information the companies who insure persons under personal property floaters, personal effects floaters or fire policies with off premises coverage would be well advised to refer their claims to the adjuster who is handling the bailee loss. In most cases the adjuster will be able to satisfy the claim under the bailee policy and the company who has issued the floater or off premises policy can retire its file. If these claims, however, are referred to many different adjusters, no one person has any idea of how many claims are involved, what companies are involved, or the dollar amount of such claims.

In a recent loss there was not adequate insurance to pay all subrogated claims, though otherwise uninsured claimants were paid in full. Before the balance of the bailee policy could be pro-rated it was of course necessary to ascertain every last payment made by off premises and floater insurers. Aside from the task of tracking down all these subrogating companies, the adjuster was compelled to write as many as a dozen letters to some companies, general agents and other adjusters to get adequate information to include their claims. Because of this situation the bailee insurer had no other alternative but to withhold payment until the statute of limitations had run. As a corollary to this confused adjustment situation, some companies although signatories to the Agreement of Guiding Principles referred their subrogation cases to attorneys for suit, despite the fact that these companies had been informed of the facts of the loss and the insurance available.

It would seem that we in the loss end of the business can do better than that. If all claims cannot be referred to the adjuster assigned to the bailee loss, after notification of the loss by the National Board, we can at least assist the adjuster and the bailee insurer by supplying all requested information and certainly we can prevent the filing of useless and vexatious law suits.

The Good Health Clause—What it Says and What Some Courts Say it Says

WILLIAM A. WICK*
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A MAN dies the owner of an insurance policy on his life. The beneficiary, his surviving widow, duly files proof of death and applies to the company for payment of the proceeds. To her surprise and consternation the insurance company refuses payment, but instead tenders back the premiums paid, claiming that the policy is void by reason of the provision that:

> "This policy shall not take effect unless, on the date of delivery hereof, the assured is alive and in sound health".[1]

In defense of its position the insurance company points out that the insured died of cancer only a month after delivery of the policy to the insured, that he must therefore have been afflicted with cancer at the time of delivery, that if he was afflicted with cancer at the time of delivery, he was obviously not in good health and if he was not in good health at that time, the policy by its very terms never took effect as a binding insurance contract.

The widow promptly files suit on the policy. She alleges and proves that to all outward appearances her husband was in the best of health at the time of delivery of the policy, that all concerned in good faith believed him to be in good health, and that the company's medical examiner passed her husband as a first-class insurance risk. The widow argues that the term "sound health" as used in the policy refers to apparent good health, not actual good health and that, in any event, the insurance company, having examined the insured and found him to be in good health, is estopped to assert the contrary thereafter, in the absence, at least, of some evidence of a change in the condition of his health between the date of the medical examination and the date on which the policy was delivered.

The insurance company alleges and proves by conclusive medical testimony that the insured must have been suffering from cancer in its advanced stages both on the date of the application and on the date of delivery of the policy. The company argues that sound health, or the lack of it, is a simple question of fact wholly independent of appearances and wholly independent of any one's belief. Belief being immaterial, the company maintains the failure of the medical examiner to detect the existence of cancer in the insured could not prejudice the company's rights particularly in view of the conclusive evidence that the insured was in fact suffering from a fatal disease when the policy was delivered to him.

How will this controversy be resolved? Conceding the danger of prophecying the outcome of a lawsuit, this much may be said. If the case gets to the jury, it is likely that the insurance company's contention that actual ill health defeats recovery on the policy, whether known to the insured or not, will receive short shrift, even though the court so instructs the jury. For a graphic illustration, see *Independent Life and Accident Insurance Co. v. Roddam*, (Fla., 1955), 81 So. 2d 22, wherein the jury gave the insured a clean bill of health, under actual-good-health instructions, despite the uncontroverted fact that the insured had been taken to the hospital unconscious with cancer of the brain one week before delivery of the policy and died a few months later. The court felt constrained to reverse.

A court, faced with the problem of construing the "good health" clause as a question of first impression, has ample room in which to gravitate. There are at least three schools of opinion on the subject: first, the strict construction or "actual good health" school; second, the "apparent good health" school; third, what may be termed the "change-of-health" school, which in turn

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[1] A 1921 survey revealed that the policies of 112, out of 125 insurance companies canvassed, contained "good-health" clauses. Coke, *The Commencement of the Risk in the Case of a Life Insurance Policy*. 51 Assoc. of Life Ins. Counsel 2, 3. (1921). The language varies from policy to policy, of course, and, in case of a lawsuit, differing language may lead to differing results.

breaks down into two subdivisions, one of which applies the change-of-health doctrine in all circumstances and the other of which applies the change-of-health doctrine only to medical policies, applying the actual good health test where there has been no medical examination.[2]

The direction in which a court will move in a given case is, of course, influenced, to some extent at least, by the language of the particular "good health" clause. Indiana, for instance, seems to hew to the actual good health line, although, not yet having squarely decided that lack of knowledge of ill health on the part of the insured is immaterial, it can not be said to have committed itself irrevocably to that doctrine. In *Western and Southern Life Insurance Company v. Persinger* (1936) 101 Ind. App. 522, 199 N.E. 880, the policy provided:

> "No obligation is assumed by the Company unless on the date of delivery hereof the insured is alive and in sound health * * *".

It was clear from the evidence that the insured was suffering from a uterine tumor at the time of delivery of the policy and she died of cancer ten months later. It also appeared that the insured probably knew that she was not well at the time of the application, because, her doctor, though not advising her of the existence of the tumor, did tell her that hers was a surgical case. Nevertheless the company, on appeal of the action, for some reason dropped its claim of misrepresentation and rested its case squarely on the effect of the "good health" clause. Reversing judgment below for the plaintiff beneficiary, the court held (101 Ind. App. 522, 525):

> "The evidence conclusively shows that the insured was not in sound health when the policy was issued and delivered; therefore, there existed such a breach of the insurance contract as to relieve appellant of liability".[3]

In another Indiana case, *Mutual Life Insurance Co. v. Hoffman* (1921) 77 Ind. App. 209, 133 N.E. 405, the wording of the "good health" clause was quite different from that of the *Persinger* case, discussed above. The policy provision in the *Hoffman* case was as follows:

> "The proposed policy shall not take effect unless it shall have been delivered to and received by me during my *continuance* in good health". (Emphasis supplied)

Said the court in that case, at 133 N.E. p. 410:

> " 'Continuance in good health' implies that the applicant was in good health when the application was made. * * * The clause in question has no reference to any unsoundness of health at the time of or previous to the application and medical examination. It refers solely to a change in the condition of health after the making of the application and medical examination".

The court then went on to distinguish another case, partly on the ground that the word "continuance" was absent from the "good health" clause.[4]

The Actual Good Health Doctrine

The actual good health doctrine probably derived from the early Massachusetts case of *Gallant v. Metropolitan Life Insurance Co.* (1896) 167 Mass. 79, 44 N.E. 1073, in which the court, construing a typical "good health" clause, refused to rule that the favorable report of the company's medical examiner estopped the company from asserting that the insured was not in the required state of health on the date of the

[2]See annotations (1908) 17 L.R.A. (NS) 1144; (1912) 43 L.R.A. (NS) 725; 136 A.L.R. 1516; also, Notes (1934) 34 Colum. L. Rev. 1508; (1936) 11 Temp. L.Q. 262; (1939) 24 Iowa L. Rev. 787; (1951) 8 Wash. & Lee L. Rev. 94 and see 1 Appleman, *Insurance Law and Practice* (1941) Secs. 151-157.

[3]See also *Metropolitan Life Insurance Co. v. Willis* (1906) 37 Ind. App. 48, 76 N.E. 560; *Metropolitan Life Ins. Co. v. Wolford* (1912) 49 Ind. App. 392; *Ebner, Admt'r v. Ohio State Life Ins. Company* (1918) 69 Ind. App. 32; 121 N.E. 315, all of which follow the actual good health doctrine, but in all of which there is at least a suspicion of bad faith on the part of the insureds.

[4]The same distinction was noted in *National Life & Accident Insurance Company v. Green* (Miss., 1941), 3 So. 2d 812, in which the Mississippi court, holding the actual good health test applicable to a non-medical policy, distinguished another case on the ground that "in the *Elmore* case for illustration, the phrase was 'continued good health'. The word 'continued' naturally carried a meaning of comparative health as between the time of examination and date of delivery of the policy".

policy, but held instead (44 N.E. 1073, 1074) that:

> "if, *in fact,* the insured at that time was not in sound health, the defendant is not liable on the policy * * *". (Emphasis supplied)

This doctrine has thus come to be known as "the Massachusetts rule" and, sometimes, even as the "harsh Massachusetts rule".[5] Harsh or not, the rule has been followed in at least nine states,[6] and in fact, has been claimed to represent the majority view.[7]

The rationale of the actual good health doctrine is that the parties, being free to contract as they pleased, have in unmistakable terms made the fact of good health a condition precedent to insurance coverage and that it is not within the province of the court, whatever its sympathies, to remake the insurance contract, either by deleting the good health clause or by reading into it language which is not there. In *Packard v. Metropolitan Insurance Company* (1903) 72 N.H. 1, 54 Atl. 287, a particularly unfortunate case in which the insured, a ten year old boy, died of heart disease, a malady from which, it developed, he had been suffering even prior to the issuance of the policy, unknown to any one but his doctor, the New Hampshire court held for the insurance company, explaining its position thus (54 Atl. p. 288):

> "The question, then, is what did the parties intend by this provision? It must be presumed that they intended what the words used by them ordinarily signify in common speech. This leaves little room for interpretation, since there is but slight ambiguity in the terms of the provision. No obligation was assumed

[5] See *Brubaker v. Beneficial Standard Life Insurance Co.* (Dist. Ct. Apps. Cal., 1955) 278 P. 2d 966, 969. Query whether the adjective "harsh" is really justified. If the "good health" condtion is secreted in the fine print of the policy, so as to emerge as a "sleeper" at the death of the insured, that is one thing. But if, as is the common practice, it appears in the application immediately above the signature of the applicant and again in the policy itself, what right has the insured to assume that it does not mean precisely what in unmistakable layman's terms it says? In most instances, of course, the insured with the examining doctor's favorable report to back him up is convinced that he is physically healthy. He therefore, willingly gambles that his health will in fact be good on the date of delivery, just as he willingly gambles on the similar requirement that he must be living on that date. But then it is the fact of mistaken belief and a gamble unexpectedly lost that is shocking and harsh, not the legal consequences which under the clear provisions of the contract should flow from those harsh realities.

[6] *Connecticut: Popowicz v. Metropolitan Life Insurance Co.* (1932) 114 Conn. 333, 158 Atl. 885; *Rippel v. Metropolitan Life Insurance Co.* (Conn., 1942) 24 A. 2d 888; *Kelly v. John Hancock Mutual Life Insurance Co.* (1944) 131 Conn. 106, 38 A. 2d, 176; *Florida: Gulf Life Insurance Company v. Green* (Fla., 1955) 80 So. 2d 321; *Independent Life and Accident Insurance Company of Florida v. Roddam* (Fla., 1955) 81 So. 2d 221; *Massachusetts: Gallant v. Metropolitan Life Insurance Co.* (1896) 167 Mass. 79, 44 N.E. 1073; *Barker v. Metropolitan Life Insurance Co.* (1905) 188 Mass. 542, 74 N.E. 945; *Mutual Trust Life Insurance Co. v. Ossen,* applying Mass. law (CCA 2d 1935) 77 F. 2d 317; *Connolly v. John Hancock Mutual Life Insurance Co.* (Mass., 1948) 79 N.E. 2d 189; *Mutual Trust Life Insurance Co. v. Tardelli* (1st. Cir., 1953) 201 F. 2d 420; *Minnesota: Murphy v. Metropolitan Life Insurance Co.* (1908) 106 Minn. 112, 118 N.W. 355; *Pampusch v. National Council of Knights and Ladies of Security* (Minn., 1920) 176 N.E. 158. But see *Thompson v. Prudential Life Insurance Company* (1936) 196 Minn. 372, 265 N.W. 28, which holds applicable to the "good health" clause a 1927 Minnesota statute, permitting avoidance of non-medical insurance policies on grounds of misrepresentation or breach of warranty, only if intent to deceive is established; *New Hampshire: Packard v. Metropolitan Insurance Co.* (1903) 72 N.H. 1, 54 Atl. 287; *Karp v. Metropolitan Life Insurance Co.* (1933)—N.H.—, 164 Atl. 219; *Ohio: Metropolitan Life Insurance Co. v. Howle* (1900) 62 Ohio St. 204, 56 N.E. 908; *Metropolitan Life Insurance Co. v. Feczko* (Ohio App., 1927) 159 N.E. 486; *Acacia Mutual Life Insurance Company v. Koch* (1937) 57 Ohio App. 125, 12 N.E. 2d 295; *Russell v. Penn Mutual Life Insurance Co.* (Ohio App., 1941) 41 N.E. 2d 251; *Texas: American National Insurance Co. v. Jarrell* (Tex. Civ. App., 1932) 50 S.W. 2d 875; *American National Life Insurance Co. v. John R. Corley Co., Inc.* (Tex. Civ. App., 1934) 73 S.W. 2d 598; *American National Insurance Co. v. Lawson* (Tex. Comm. of Apps., 1939) 127 S.W. 2d 294; *Morris Association v. Tatum* (Tex. Civ. App., 1941) 152 S.W. 2d 871; *National Life and Acc. Insurance Co. v. Whitlock* (Okla., 1947) 180 P. 2d 617 (applying Texas law); *Washington: Logan v. New York Life Insurance Co.* (1919) 107 Wash. 253, 181 Pac. 906; *Fraser v. Metropolitan Life Insurance Co.* (1931) 165 Wash. 667, 5 P. 2d 978; see also *Doernbecher v. Mutual Life Insurance Company of New York* (Wash., 1943) 132 P. 2d 751; and probably *Indiana:* see footnote 3.

[7] See 1 Appleman, *Insurance Law and Practice* (1941) Sec. 154, p. 158; also *American National Insurance Co. v. Jarrell* (Tex. Civ. App., 1932) 50 S.W. 2d 875; *Metropolitan Life Ins. Co. v. Feczko* (Ohio App., 1927) 159 N.E. 486, 487. But the change-of-health courts also claim the weight of authority on their side. See *Prudential Insurance Co. v. Kudoba* (1936) 332 Pa. 30, 186 Atl. 793, 795; *Brubaker v. Beneficial Standard Life Insurance Co.* (Dist. Ct. App. Cal., 1955) 278 P. 2d 966, 968 and the author of an annotation in 136 A.L.R. 1516 (1942) has reached the same conclusion.

by the defendant unless the insured was alive, and in sound health, on the day of the date of the policy".[5]

It follows inevitably from this steadfast refusal, on the part of the strict construction courts, to twist the plain meaning of the English language that they should conclude:

> "It is the *fact* of the sound health of the insured which determines the liability of the defendant, not his apparent health, or his or any one's opinion or belief that he was in sound health". *Murphy v. Metropolitan Life Insurance Co.* (1908) 106 Minn. 112, 118 N.W. 355, 356.

In the *Murphy* case, quoted above, the policy had contained a proviso that:

> "* * * no obligation is assumed by the Company prior to the date hereof nor unless on said date the assured is alive and in sound health".

The assured had died of cancer, the only manifestation of which at the time of the application had been a slight swelling and soreness of the knee, but the cancer had remained unsuspected and undetected until some time after the date of the policy. On these facts the Minnesota Supreme Court had affirmed a directed verdict for the insurance company.

Since the fact of ill health, if it was a fact, remained unaffected by the failure of the company's doctors to discover it, the strict construction courts drew no distinction between medical and non-medical policies. As stated by the Connecticult court in *Popowicz v. Metropolitan Life Ins. Co.* (1932) 114 Conn. 333, 158 Atl. 885:

> "That the insured did not know she had this disease or had suffered before the issue of the policy from anything more than temporary ailments, and hence that she was not guilty of any willful misrepresentation in her application for the policy, even if the finding of the trial court to this effect should be sustained, could not avail the plaintiff. *The facts that she was examined by a physician representing the company before the policy was issued, and that he reported her to be in sound health, would not in themselves be sufficient to establish a waiver of compliance with the conditions in the policy.* Such a waiver, if it could exist at all, would have to rest upon the further fact that the physician discovered, or ought in the exercise of reasonable care to have discovered, that the insured was suffering from tuberculosis". (Emphasis supplied)

As regards the degree of health which will satisfy the requirement that the insured be in "good health" or in "sound health", the actual good health authorities are in general accord. In the language of the Supreme Court of Tennessee in *Metropolitan Life Insurance Co. v. Chappell* (Tenn., 1925), 269 S.W. 21:

> "As used in life insurance policies, there is no material difference between 'sound health' and 'good health'. * * * The phrase, 'sound health', when used in the sense used in the policy under consideration, is not to be taken literally. It does not mean perfect health, or imply absolute freedom from bodily infirmity or tendency to disease, but means generally the absence of any vice or disease in the constitution of a serious nature, or that has a direct tendency to shorten life, as contradistinguished from a temporary ailment or indisposition".[6]

There is general agreement too that clauses providing, "This policy shall not take effect unless, on the date of delivery hereof, the assured is alive and in sound health", and provisions of similar import, clearly create *conditions precedent* to the

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[5] It is interesting to note that in *Combs v. Equitable Life Ins. Co. of Iowa* (4th Cir., 1941), 120 F. 2d 432, the court stated the same principle, saying (p. 436): "Policies of insurance in cases of doubt or ambiguity are to be construed liberally in favor of the assured, but they must be construed in accordance with their terms as are other contracts. Courts should not make uncertain that which is certain, and they can not make contracts for the parties. (citations) 'The province of construction lies wholly within the domain of ambiguity'. (citation) "When a provision is too plain to be misunderstood, there is nothing to construe". (citation) Having thus faithfully stated the position of the strict construction courts, the court in the *Combs* case promptly turned around and read the word, "apparent", into the contract prior to the phrase, "good health".

[6] See annotation, defining "good health": 40 A.L.R. 662 (1926); 100 A.L.R. 362 (1936).

binding effect of the insurance contract.[10] This conclusion has far reaching consequences.

First, in view of the general principal that one seeking to enforce an obligation must allege and prove compliance with all conditions precedent, it would follow that the burden of proving good health would rest upon the policy beneficiary. A minority of courts has so held.[11] On the other hand, notwithstanding the condition precedent concept, it has generally been held, in the interests of equity and for practical reasons, that the insurance company has the burden of proving ill health if it seeks to defend on that ground.[12]

Secondly, if good health is a condition precedent, statutes, requiring a finding of intent to deceive, as a prerequisite to the avoidance of liability on an insurance policy by reason of misrepresentation or breach of warranty,[13] would not seem applicable to the delivery-in-good-health clause. Several cases have so held.[14] Other courts, maintaining that there is no substantive difference between a contractual stipulation that the insured must in fact be in good health and a statement by the insured that "I am in good health", have used a judicial shoehorn to force the "sound health" condition to fit the last of a misrepresentation statute. Such a statute, as explained in *Prudential Insurance Co. of America v. Saxe* (U.S.C.A., D.C., 1943) 134 F. 2d 16, 25:

> "* * * was intended to prevent innocent and immaterial misrepresentations in the applications from avoiding the insurance, and its effect can not be escaped by the device of contracting to the contrary or labeling a contractual attempt to do this as a 'condition precedent' to attaching of the risk".[15]

Query, however, whether a statute merely providing that innocent misstatements shall not bar recovery unless their falsity materially affects the risk,[16] reflects a legislative intent, as suggested in the *Saxe* case,

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[10] 1 Appleman, *Insurance Law and Practice*, Sec. 151, p. 151. Alabama, on the other hand, has construed the clause as being in the nature of a warranty, *Reliance Life Insurance Co. v. Sneed* (1928) 217 Ala. 669, 117 So. 307, and courts which hold that the clause requires knowledge on the part of the insured and even intent to deceive, have in effect reduced the clause to the status of a mere representation. *National Life and Accident Insurance Co. v. Martin* (1926) 35 Ga. App. 1, 132 S.E. 120; *United Beneficial Life Insurance Co. v. Knapp* (1936) 175 Okla. 25, 51 P. 2d 963.

[11] *Hennessy v. Metropolitan Life Insurance Co.*, 74 Conn. 699, 52 Atl. 490; *Connolly v. John Hancock Mutual Life Insurance Co.* (1948) 322 Mass. 678, 79 N.E. 2d 189; *Mutual Trust Life Insurance Co. v. Tardelli* (CCA 1st, 1953) 201 F. 2d 420; *Johnson v. Mercantile Mutual Life Insurance Company*, 120 Mo. App. 80, 96 S.W. 697; *Packard v. Metropolitan Insurance Company* (1903) 72 N.H. 1, 54 Atl. 287; *Volker v. Metropolitan Life Insurance Co.*, 50 N.Y. 199; *Metropolitan Life Insurance Co. v. Hillard* (1913) 2 Ohio App. 223.

[12] *Western and Southern Life Insurance Co. v. Spencer* (1932) 95 Ind. App. 281, 179 N.E. 794; *Wood v. Cosmopolitan Life Insurance Co.* (1932) 266 Ill. App. 556; *Murphy v. Metropolitan Life Insurance Co.* (1908) 106 Minn. 112, 118 N.W. 355; *Bathe v. Metropolitan Life Insurance Co.*, 152 Mo. App. 87, 132 S.W. 743; *Francis v. Mutual Life Insurance Co.*, 55 Ore. 280, 106 Pac. 323; *Interstate Life and Accident Co. v. Potter* (Tenn. App., 1933) 68 S.W. 2d 119; *Logan v. New York Life Insurance Co.* (1919) 107 Wash. 253, 181 Pac. 906.

[13] *Alabama:* Code 1940 Tit. 28, Sec. 6; *D. C.:* Code 1940, Sec. 35-414; *Minnesota:* St. 1927, Sec. 3396; *Missouri:* Mo. St. Ann. Sec. 5732, p. 4373; *New York:* Ins. Law N.Y. Sec. 107 (f); *Ohio:* Rev. St. (1892) Sec. 3625; *Wisconsin:* St. 1931, Secs. 209.06 (1), 209.07. Typical of these statutes is Section 35-414, D.C. Code (1940), which reads: "The falsity of a statement in the application for any policy of insurance shall not bar the right to recovery thereunder unless such false statement was made with intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the Company".

[14] *Barker v. Metropolitan Life Insurance Company* (1905) 188 Mass. 542, 74 N.E. 945; *Mutual Trust Life Insurance Co. v. Ossen* (CCA N.Y., 1935) 77 F. 2d 317, Cert. Den. 296 U.S. 616; *Metropolitan Life Insurance Company v. Howle* (1900) 62 Ohio St. 204, 56 N.E. 908 (R. St. (1892) Sec. 3625); *Rhode Island: Chorney v. Metropolitan Life Insurance Co.* (1934) 54 R.I. 261, 172 Atl. 392 (statute in terms applicable only to non-medical policies); *Clark v. Prudential Insurance Company of America* (1935) 219 Wis. 422, 263 N.W. 364 (holds Wisconsin St. Sec. 209.06 inapplicable to a condition precedent) but see also Wisconsin St. Sec. 209.07, providing that a medical examiner's report, indicating good health, shall estop the company from asserting the contrary in an action on the policy. See also *Wright v. Federal Life Insurance Co.* (Tex. Comm. App., 1923) 248 S.W. 325, wherein Vernon's Ann. Civ. St. Art. 5043, requiring disclaimer within a reasonable time in order to avoid a policy on grounds of misrepresentation, was held inapplicable to a condition precedent.

[15] To the same effect, see *Roe v. National Life Ins. Co.* (1908) 137 Ia. 696, 115 N.W. 500; *Fields v. Metropolitan Life Ins. Co.* (Mo. App., 1938) 119 S.W. 2d 463. The same argument could be made with respect to statutes like Burns Indiana Stat. Ann. (1952 Repl.) Sec. 39-4206a, providing that statements in the application shall be construed as representations, not warranties, in the absence of fraud.

[16] D.C. Code (1940) Sec. 35-414; see footnote 13, above.

to prohibit the parties from establishing, as a *sine qua non* to liability on the policy, a fact which obviously does materially affect the risk, namely, the state of health of the insured? Thus, in Alabama, where the "good health" clause has been construed to be a warranty, rather than a condition precedent, (on which basis of course the Alabama innocent misstatement statute has been held applicable[17]), it has been held that actual ill health, whether known to the insured or not, "increases the risk of loss" within the meaning of the statute and therefore bars recovery.[18]

With respect to medical policies, the legislature of at least two states have repudiated the "good health" condition in terms too certain to leave room for argument. Iowa and Wisconsin have enacted statutes, providing that a company medical examiner's certificate of health estops the company from asserting that the assured "* * * was not in the condition of health required by the policy at the time of issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the insured".[19]

A third consequence of making the fact of good health a condition precedent to the taking effect of the contract, it has been argued, should be to render inoperative the incontestable clause of the policy.[20] This argument is logically unanswerable, for if the contract itself never became binding due to breach of the condition precedent, how can it be said that the incontestable clause embodied in the contract became binding? The courts have been unwilling to carry the condition precedent theory to this extreme, however, but have almost uniformly held that the expiration of the contestable period bars even the defense of breach of the "good health" condition.[21] Candidly admitting the logical inconsistency in this position, they have generally based their stand on considerations of policy, like the following:

> "A construction which reads into it (the incontestable clause), as permanent provisions, the very conditions which apparently it was designed to terminate, makes it not only inoperative, but exceedingly deceptive, for, while the clause would serve as an inducemnet to the applicant and remove his unwillingness to accept a policy containing many conditions upon which it might be defeated, the contract would still hold him rigidly to each and every warranty and condition contained in it. Such a result may be avoided by construing the incontestable clause to mean that if the policy does not mature or terminate within three years, but during that time is outstanding in the hands of the insured, and is not utterly void on its face, and is not avoided by the Company, but is acted upon by both parties as a subsisting contract, it is 'in continuous force' within the true meaning of the clause." See *Mutual Reserve Fund Life Assn' v. Austin* (1st. Cir., 1905) 142 Fed. 398, 402.

One further point in connection with the actual good health doctrine will bear consideration. Suppose the death of the insured results from a cause other than that which rendered him in ill health on the policy delivery date. Is there any necessity of a causal relationship between the death and the pre-existing ill health, akin perhaps to the doctrine of "proximate cause" in the law of negligence? Two "good health" clause cases have been found, in which this question was involved. In both the courts passed over the question without comment, apparently regarding the absence of a causal link between death and ill health as immaterial. Thus, in *Barker v. Metropolitan Life Insurance Company* (1905) 188 Mass. 542, 74 N.E. 945, the insured died from pneumonia, whereas he had previously been suffering from a cystic disease of the kidneys. Held, that there was a breach of the "good health" condition; wherefore, no recovery on the policy. Again, in *Acacia Mutual Life Insurance*

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[17]Alabama Code 1940—Title 28, Sec. 6.

[18]*Liberty National Life Ins. Co. v. Trammel* (Ala. App., 1949) 51 So. 2d 167, 172: "If the insured, at the time of the issuance of this policy was suffering from a disease which *increased* the risk of loss, the warranty in the policy as to sound health was breached, regardless of whether the insured knew of the presence of such disease" (citing *Aetna Life Ins. Co. v. Norfleet* (1936) 232 Ala. 599, 169 So. 225). The *Trammel* case was reversed, however, in 51 So. 2d 174, though not on grounds contradictory to the above.

[19]Wisconsin Stats. 1921, Sec. 1977-2 and see *Kleiger v. Metropolitan Life Insurance Co.* (1923) 180 Wis. 320, 192 N.W. 1003; also, Iowa Code Sec. 1812 and *Unterharnscheidt v. Missouri State Life Ins. Co.* (1912) 160 Iowa 223, 138 N.W. 459.

[20]See 32 Mich. L. Rev. 862, 863 (1934).

[21]3 Couch, *Cyclopedia of Insurance Law* (1929) Sec. 2155b and cases there cited.

Company v. Koch (1937) 57 Ohio App. 125, 12 N.E. 2d 295, death resulted from uremic poisoning, produced by an attack of influenza. A tumor in the right side had been the cause of ill health on the policy date. In this case the court mentioned the disparity between cause of death and pre-existing ill health, but did not discuss its significance, if any, merely affirming judgment for the plaintiff insurance company.

There is dictum in some of the Texas decisions, on the other hand, which suggests that some causal connection between death and ill health at the time of delivery of the policy may be necessary in that state. Said the Texas court in *American National Insurance Co. v. Jarrell* (Tex. Civ. App., 1932) 50 S.W. 2d 875:

> "If the insured is at the time of delivery of such policy actually afflicted with a disease *which continues and ultimately causes his death*, according to the weight of authority, it is immaterial whether such condition existed at the date of his application or arose between that date and the delivery of the policy, or whether the insured knew his condition in that respect or not".[23] (Emphasis supplied)

While by no means conclusive of the result in a case, involving breach of a "good health" condition, it has been squarely held in some of the misrepresentation decisions that the lack of a causal link between the matter misrepresented and the death of the insured is immaterial. The rationale of this conclusion was explained by the United States Court of Appeals for the Fifth Circuit in *Rhodes v. Metropolitan Life Insurance Co.* (1949) 172 F. 2d 183 as follows (p. 187):

> "The argument that the misrepresentation was immaterial because the insured died from coronary thrombosis and not from diabetes, we think begs the question. The real issue has to do with the circumstances under which the defendant assumed the risk, whether it would have assumed the risk it did assume, had the truth with respect to Dampf's health been made known to it".[24]

[23]See also *Morris Assoc. of Brownswood v. Tatum* (Tex. Civ. App., 1941) 152 S.W. 2d 871.

[24]See also *Western & Southern Life Insurance Co. v. Ogrodnik*, 290 Mich. 254, 287 N.W. 454.

The Apparent Good Health Doctrine

As previously indicated, a second line of authorities, swayed no doubt by their sympathies for the bereaved survivors of the deceased insureds, have taken the position that the "good health" clause does not mean what it clearly seems to say, but means only that the insured must be in *apparent* good health and that he is aware of nothing to indicate the contrary.[25]

This view was rationalized in *Combs v. Equitable Life Ins. Co. of Iowa* (4th Cir., 1941) 120 F. 2d 432, p. 436 as follows:

> "Policies of insurance, as other contracts, should be construed 'according to the ordinary sense and meaning of the terms employed * * *'. *When one says he is in good health, he does not mean, and nobody understands him to mean, that he may not have a latent disease of which he is wholly unconscious.* It is doubtless competent for a life insurance company, in its policies, to take the expression 'good health' out of its common meaning and make it exclude every disease, whether latent and unknown or not (assuming that any person would ever accept a policy of that kind), but it must do so in distinct and unmistakable langauge". (Emphasis supplied)

The writer is inclined to take issue with the *Combs* court in its construction of the meaning of the term "good health" even in the popular sense. When a man says to a friend on the street, "I am in good health", he is offering that statement not as a belief but as a fact and is asking his friend to accept it as such. It is true, of course, health being a highly uncertain condition at best, that the friend may be disinclined to accept the statement as a fact without an explanation of the basis for the speaker's conclusion. It is also true that any statement offered as a fact is also impliedly a statement of the speaker's

[25]*California: Brubaker v. Beneficial Standard Life Insurance Co.* (Dist. App. Cal., 1955) 278 P. 2d 966; *Georgia: National Life and Accident Insurance Co. v. Smith* (1925) 34 Ga. App. 242, 129 S.E. 114; *Gulf Life Insurance Co. v. Griffin* (1950) 80 Ga. App. 730, 57 S.E. 2d 296; *Oklahoma: National Aid Life Association v. Persing* (1937) 178 Okla. 522, 63 P. 2d 35; *Farmers and Bankers Life Insurance Co. v. Baxley*, 202 Okla. 531, 215 P. 2d 941; *Virginia: Combs v. Equitable Life Insurance Company of Iowa* (1st Cir., 1941) 120 F. 2d 432; *Gilley v. Union Life Insurance Co.* (1953) 194 Va. 966, 76 S.E. 2d 165.

belief. But a statement offered as a fact does not become a mere statement of belief, either because the statement may not be accepted as true, or because it is presumably supported by the speaker's belief.

There is another flaw in the *Combs* court's reasoning. The principle that language in a contract is ordinarily to be construed in its *popular* sense does not mean that it is to be removed from context, but rather that it must be construed as if a layman were reading the contract. A layman reading the *Combs* contract provision that:

> "The company shall incur no liability under the policy issued until said policy is delivered to me and the entire first premium therefor is actually paid while I am in good health * * *"

would recognize at once that this is not in any respect a statement by the insured of the condition of his health. For the court to remove the term from context and treat it as a statement of the insured is, therefore to distort its meaning.[25]

The Change-of-Health Doctrine

A probable majority[26] of the courts have arrived at the conclusion that the "good health" clause applies only to changes in the condition of the insured's health between the date of the application and medical examination and the date of issuance or delivery of the policy.[27] As previously noted, the adherents to this doctrine break down into two classes: those which apply the change-of-health principle regardless of whether there has been a medical examination[28] and those which invoke the change-of-health principle only in the case of medical policies, applying the actual-good-health test to non-medical policies.[29]

In some instances the courts have been led to adopt the change-of-health view by the language of the particular "good health" clause at issue in the case. We have already discussed clauses calling for delivery during the "*continuance* of good health" which obviously suggest a comparison of the state of health on application date with the state of health on delivery date.[30] An even clearer example is a clause providing that:

> "insurance shall date from the date of approval of this application * * * *provided I shall then be in the same condition of insurability as shown by this application* * * *". See *Shaner v. West Coast Life Insurance Co.* (10th Cir., 1934) 73 F. 2d 681, 682, 685. (Emphasis supplied)

Again, in *Webster v. Columbian National Life Insurance Co.* (1909) 131 App. Div. 837, 116 N.Y.S. 404,[31] following the "good health" clause in the policy, there was a provision that if the examination of the insured was satisfactory, the policy was incontestable except in the event of suicide committed within one year. In view of this language the only basis on which the "good health" clause could be reconciled

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[25] It should be said in defense of the Fourth Circuit Court in the *Combs* case, however, that it was compelled to follow the law of Virginia, which had construed the term as meaning apparent good health. See *Combs v. Equitable Life Ins. Co. of Iowa*, 120 F. 2d 432, 436.

[26] But see footnote 7, *supra*.

[27] Annotation 136 A.L.R. 1516 (1942) and cases there cited.

[28] *Interstate Life and Accident Insurance Co. v. McMahon* (1934) 50 Ga. App. 543, 179 S.E. 132 (no medical); *Pierce v. Life Ins. Co. of Virginia* (1935) 50 Ga. App. 337, 178 S.E. 189; *Family Fund Life Insurance Co. v. Rogers* (1954) 90 Ga. App. 278, 82 S.E. 2d 870 (no medical). Noteworthy in the last named case is the following interesting statement (82 S.E. 2d pp. 873-4): "The requirement in a policy of life insurance that the insured be in sound health at the date of issuance of the policy refers to a change in health between the time of taking the application and date of issuance of the policy, *where the policy was issued without a medical examination* * * *". If this means that the change of health doctrine appeals *only* where there has been no medical, then Georgia is unique. More likely the court meant to say, "*even* where the policy was issued without a medical examination".

[29] *Illinois: Auriemma v. Western and Southern Life Insurance Co.* (1944) 323 Ill. App. 271, 55 N.E. 2d, 292; *Kentucky: Prudential Insurance Co. v. Hodge* (1929) 232 Ky. 44, 22 S.W. 435; *Metropolitan Life Insurance Co. v. Taylor* (1927) 219 Ky. 549, 293 S.W. 1061; *Western and Southern Life Insurance Co. v. Downs* (1946) 301 Ky. 322, 191 S.W. 2d 576; *Kansas: National Reserve Life Insurance Co. v. Jeffries* (1938) 147 Kan. 16, 75 P. 2d 302 (but see contra *Klein v. Farmers and Bankers Life Insurance Company* (1931) 132 Kan. 748, 297 Pac. 730); *Mississippi: National Life and Accident Insurance Company v. Green* (Miss., 1941) 3 So. 2d 812; *New York: Webster v. Columbia National Life Insurance Co.* (1909) 131 App. Div. 837, 116 N.Y.S. 404; *Chinery v. Metropolitan Life Insurance Co.* (1920) 112 Misc. 107, 182 N.Y.S. 555; *Pennsylvania: Prudential Insurance Co. v. Kudoba* (1936) 332 Pa. 30, 186 Atl. 793.

[30] See note 4, above, and text to which it refers.

[31] (Affirmed 196 N.Y. 523, 89 N.E. 1114).

with the incontestable clause which followed it, the court held, was to treat the former as applicable only to diseases with which the insured might be stricken between the time of the medical examination and the time of acceptance of the risk by the company.

One suspects that if the evolution of the change-of-health doctrine were traced, it would be discovered that the doctrine began with "good health" clauses like those just discussed, which impelled the conclusion that they were intended to cover only changes of health occurring after the medical examination. From that point on, spurred no doubt by the natural sympathies of the courts, the doctrine spread, via an uncritical *stare decisis*, until soon it was being applied in situations where there was little or no reason for its application. Whatever the majority opinion may be, it is submitted that any court which construes a clause providing "this policy shall not take effect unless on the date of delivery hereof the assured is alive and in sound health", as intended to apply only to changes of health after the application and before the date of delivery, is writing for the parties a contract which they never wrote for themselves.

In fact, in most instances, the change-of-health courts do not seriously contend that their construction is really justified by the language of the contract. They base their conclusions on arguments like the following:

> "The examining doctor is the agent of the insurer. The knowledge gained by him is imputed to the insurer. (citation) Therefore, in such case the insurer determines through its own agent the insurability of the applicant. It thereby establishes that status, and, on the condition so established through its own agent, appointed for the purpose, it accepts the risk. Under such circumstances it is but fair, reasonable, and logical to say the parties mean the insurance shall be issued and become effective unless the applicant is in worse health upon delivery of the policy than when the examination is made". (See *National Life and Accident Insurance Co. v. Green* (Miss., 1941), 3 So. 2d 812).

Is that a valid argument? The court in the *Green* case, *supra*, says that "the insurer determines through its own agent the insurability of the applicant". This statement, offered as the basic premise which supports the court's conclusions, is nothing more than a conclusion in itself and a conclusion on the key issue in the case. If the "good health" clause means what it says, i.e. that the insured must in fact be in good health on the delivery date, then the medical examination is at best a *prima facie* determination of insurability—an attempt (unsuccessful in this instance) to get at the true state of health of the applicant. The court then goes on to say that having established insurability, the company "* * * accepts the risk". Here again is a conclusion, not an argument. If the "good health" clause means what it says, the risk is not accepted unless the applicant is in actual good health on the delivery date. Finally the court concludes: "Under such circumstances it is but fair, reasonable, and logical to *say the parties mean* the insurance shall be issued and become effective unless the applicant is in worse health upon delivery of the policy than when the examination is made". (Emphasis supplied). Why it should be fair, reasonable or logical to "say the parties mean" what their contract does *not* say they mean is something which escapes this writer.

The most cogent argument for the application of the change-of-health rule is strictly one of public policy, stated by the Supreme Court of Pennsylvania, in *Prudential Insurance Co. v. Kudoba* (1936) 323 Pa. 30, 186 Atl. 793, 795 as follows:

> "For the company later to be allowed successfully to contend that the policy never became effective because the applicant breached the sound-health clause in that he suffered from disease or bodily impairment when the policy was delivered to him, in a case where the same condition existed when the company examined him, would be to give countenance to a practice that, while perhaps not fairly to be characterized as fraudulent,[22]

[22]As regards this suggestion that the company may be practicing something approaching fraud, see footnote 5, above. The underlying notion, it is believed, is that an insured should not be held too closely to the terms of an insurance policy, in view of the well known fact that many of us, either do not read, or only half-read, our policies. The real question, however, is whether those of us who are negligent in this regard expect, or have any right to expect, that if there is anything prejudicial to our interests in the policy, a sympathetic judge will rewrite the contract in our favor.

would be unreasonably destructive of the protection which life insurance is aimed to secure. *It would result, as argued in appellant's brief, that 'no one would ever know if he were insured or not, even though he has passed a medical examination and received a policy'".* (Emphasis supplied)

With respect to the argument that uncertainty of insurance coverage contravenes public policy, there is only one answer. The determination and implementation of public policy is primarily the function of the legislature. A court is free to apply what it deems to be sound public policy only where it can do so without violating established principles of law. No principle of the law of contracts is more firmly established than the principle that:

"Policies of insurance * * * must be construed in accordance with their terms as are other contracts. *Courts should not make uncertain that which is certain, and they can not make contracts for the parties."* (See *Combs v. Equitable Life Insurance Co. of Iowa* (4th Cir., 1941) 120 F. 2d 432, 436). (Emphasis supplied)

Two further arguments advanced in *Prudential Insurance Co. v. Kudoba, supra,* (1936) 323 Pa. 30, 186 Atl. 793, were that by requiring a medical examination of the insured, the company either waived the "good health" condition or by inducing the insured to rely on the existence of insurance coverage to his detriment, estopped itself to assert that the insured was not in the required state of health. Both of these points were persuasively met in a note on the *Kudoba* case in 11 Temp. L. Q. (1936) 262, p. 263:

"It is difficult to understand why a company which issued only a small percentage of its policies without a medical examination, should set up, in clear and unmistakable language, a condition which it intended to waive by following its usual practice of demanding an examination. It is true that the court has permitted the clause to have some effect even where the company provides for an examination, but only in those cases where the impairment in health arises subsequent to the examination but prior to the issuance of the policy. If the clause was intended to be so limited, it is reasonable to believe that it would have been stated in language more in conformity with that meaning. The insurer makes a medical examination to discover patent defects in the applicant's health; it inserts the good health clause to protect itself from the latent defects which an applicant may have, but which a physician, exercising due care, can not discover. One means of protection should not be held to waive the protection afforded by another, since the insured has agreed to both means of protection under conditions which preclude a finding that he was misled."

On the estoppel question the note in 11 Temp. L. Q. has this to say (p. 264):

"In denying the insurer the right to avail itself of the defense because the insured has been led to believe he is protected, the court has created an estoppel. It is true that the delivery of a policy to an applicant, after he has submitted to an examination by the company's physician, would be sufficient to induce him to believe that his health was satisfactory. But he has agreed to a contract containing a clause that the delivery of the policy to him is of no effect unless he is in sound health. The clause is not made to depend on his apparent health, or on the state of his health as known to him, to the examining physician, or to the Company unless it is otherwise provided. Under such circumstances it is doubtful whether the insured has the right, in law, to believe he is insured so as to lay the basis for an estoppel. Certainly, under ordinary contract law, no such right would exist."

Discoverability of Ill Health

A question, left very much up in the air in most of the change-of-health cases, is whether the change of health between the date of the medical examination and the date of delivery must be a manifest change, or at least one which a second medical examination on the date of delivery would have revealed. Suppose, for example, that some time after delivery of the policy the insured dies from a cause which can be traced to an injury which the insured sustained between the examination and delivery dates, but from which the insured

had supposedly fully recovered by the time of delivery. If the fact that recovery was not complete would have been revealed by a second medical examination on the date of delivery, it is clear that most change-of-health courts would agree that a breach of the "good health" clause had occurred. If, however, the weakened condition of the insured resulting from this injury which ultimately led to his death would not have been discovered even by a second medical examination it is likely that courts, following the change-of-health doctrine, would rule that there had been no breach of the "good health" condition. They would have to so rule because their basic premise is that a condition of health sufficient to enable the insured to pass the company's medical examination is the sole prerequisite of insurability despite the "good health" clause.

Contrast this standard with the actual good health doctrine under which the *fact* of ill health on delivery date, even if both undiscovered and undiscoverable at that time so as to be provable only by hindsight, defeats the validity of the policy.[32]

In Georgia where the apparent-good-health and the change-of-health doctrines are combined,[34] a disease which developed between application and delivery dates but remained latent until after delivery, affords no basis for avoidance of the policy. Thus in *National Life & Accident Insurance Co. v. Martin* (1926) 35 Ga. App. 12, 132 S.E. 120, wherein the insured died of a disease which had originated five to fifteen years prior to issuance of the non-medical policy, it was held, in spite of a "good health" clause (132 S.E. 121):

> "The policy will not be avoided by reason of the fact that he might have been afflicted with an incipient, unknown and fatal malady, which had not at that time manifested itself, or in any way deranged, impaired or affected the general soundness and healthfulness of the system".

Why this result?—because, said the court,

> "all life carries within itself the germ of its own dissolution—to live is to begin to die". (See *National Life & Accident Insurance Co. v. Martin*, 35 Ga. App. 12, 132 S.E. 120, 122).

Delivery

Where, as is frequently the case, particularly with more recent insurance policies, good health must exist at the time of delivery of the policies[35] or at the time of delivery and payment of the first premium,[36] it sometimes becomes important to determine just when delivery takes place. It would seem plain to any layman that a policy is not delivered until received in hand by the insured, or left at his residence or place of business, or perhaps placed in the hands of one authorized by the insured to receive the policy on his behalf. It is commonly held, however, where the sole requirement is delivery, that a "constructive delivery" occurs when the company places the policy in the mail even though addressed not to the insured but to the company's own agent.[37] The same rule has been ap-

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[32]But see *Aetna Life Insurance Co. v. Hub Hosiery Mills* (CCA 1st, 1943) 170 F. 2d 547, an actual good health case, which suggests, nevertheless, that the fact of ill health must at least have been discoverable.

[34]See *Gulf Life Insurance Co. v. Griffin* (1950) 80 Ga. App. 730, 57 S.E. 2d 296, 298: The condition in the policy (good health clause) refers to a change in the condition of health between the time of taking the application and the date of issuance and delivery of the policy "• • • the term 'sound health' used in such a policy has been defined to mean that the application is free from any ailment that seriously affects the general soundness and healthfulness of the system, that the insured enjoys *such health and strength as to justify the reasonable belief that he is free from derangement of organic functions and to ordinary observation and to outward appearance his health is reasonably such that he may with ordinary safety be insured upon ordinary terms*". (Emphasis supplied).

[35]*DeFord v. New York Life Insurance Co.* (1927) 81 Colo. 518, 256 Pac. 317; *Gulf Life Insurance Co. v. Green* (Fla., 1955), 80 So. 2d 321; *Western and Southern Life Insurance Company v. Persinger* (1936) 101 Ind. App. 522, 199 N.E. 880; *Coci v. New York Life Insurance Company* (1924) 155 La. 1060, 99 So. 871; *Mid-Continent Life Insurance Co. v. Dees* (Okla., 1954) 269 P. 2d 322; *Morris Association v. Tatum* (Tex. Civ. App., 1941) 152 S.W. 2d 871.

[36]*Greenbaum v. Columbia National Life Insurance Co. of Boston*, (CCA 2d, 1932) 62 F. 2d 56; *Klein v. Farmers and Bankers Life Insurance Co.* (1931) 132 Kan. 748, 297 Pac. 730.

[37]1 Appleman, *Insurance Law and Practice* (1941) Sec. 134 p. 127 and cases there cited. This result has commonly been reached by stating, with or without basis in fact for the statement, that the soliciting agent of the company becomes the agent of both insurer and insured for purposes of delivery and receipt of the policy. *Jackson v. New York Life Ins. Co.* (CCA Or., 1925) 7 F. 2d 31. The acid test on this issue would arise if the insurance company, after mailing the policy to its agent, were to contact the agent and request the return of the policy, since it had decided not to issue this insurance after all. Under such circumstances what is the duty of this double-acting agent?

plied where the policy required that it be "delivered to and received by me".[28] *Coci v. New York Life Insurance Company* (1924) 155 La. 1060, 99 So. 871. Again, in *Mid-Continent Life Insurance Co. v. Dees* (Okla., 1954) 269 P. 2d 322, wherein the insured died between the time when the company mailed the policy to its agent and the time of receipt of the policy by the company's agent, it was held that there was a binding contract of insurance, despite the provision of the policy that it should not take effect until *"delivered to and accepted by me* during my lifetime and good health".[29] Such decisions merely further illustrate the sense of mission which seems to overtake courts only slightly less than juries where insurance is at stake. The nub of the situation is pointed out in 1 Mechem *On Agency* (2d Ed., 1914) Sec. 1050, p. 755:

> "* * * there has developed a popular prejudice against defenses by insurance companies, and a tendency on the part of the courts to protect the insured wherever possible, which have tended to make the law respecting insurance agents a distinct branch of the law of agency. *Doctrines which usually prevail are here often ignored, and rules of construction are here often extended, until it sometimes seems to be the fact that insurance litigation marks the vanishing point of many of the established principles of agency*". (Emphasis supplied.)

Waiver and Estoppel

Where the ill health of the insured has become known to the company or its agent, or where the agent is apprised of facts which, if investigated, would have led to discovery of the fact of ill health, even the strict construction courts have been quick to find a waiver of the "good health" condition or a basis for holding the company estopped to deny the good health of the insured. Thus a waiver of the "good health" condition was found in *Mutual Life Insurance Co. v. Hoffman* (1921) 77 Ind. App. 209, 133 N.E. 405, based on the fact that the soliciting agent delivered the policy and accepted payment of the premium when he knew that the insured was sick in bed. The insured (and presumably the agent) thought that the illness was merely a case of severe indigestion. But the family doctor without advising the insured had diagnosed the case as acute nephritis, a fact which investigation on the part of the agent would no doubt have revealed. Under these circumstances the court had no difficulty in imputing the knowledge of the agent to the company and thereby establishing a waiver.

It may be mentioned in passing that the majority rule in insurance cases is that the knowledge of an agent will be imputed to the principal company in the absence of collusion between the agent and the insured, even though the agent is committing a fraud upon the company, or otherwise has an interest adverse to that of the company.[40] In *Abbott v. Prudential Insurance Co.* (1939) 281 N.Y. 375, 24 N.E. 2d 187, for instance, where the agent, in violation of the "good health" clause and in fraud of the company, delivered a policy to an applicant whom he knew to be uninsurable, the court had no difficulty imputing this knowledge to the company and would have found a waiver of the "good health" condition, but for other factors discussed below.

In order to protect themselves against unauthorized waivers on the part of their agents, insurance companies have frequently inserted in their policies and sometimes in the application as well, notice that only officers of the company are authorized to alter insurance contracts or waive any terms or conditions of such contracts. Effect has been given to such non-waiver clauses in a number of cases.[41] On the other hand, some cases have held that non-waiver restrictions are not conclusive upon the insured as to matters antecedent to the issuance of the policy,[42] like pre-existing ill health. And where the company has clothed its agent with apparent authority to waive conditions of the policy and the insured has relied upon such apparent au-

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[28]Contra: *DeFord v. New York Life Insurance Co.* (1927) 81 Colo. 518, 256 Pac. 317.

[29]Where, however, a policy provided that it would be "void until *actually* delivered to the insured *in person* while in sound health," a Louisiana court did concede that actual delivery was required. *Tallan v. Mutual Life Ins. Co.* (La. App. 1933) 147 So. 110.

[40]See annotations 81 A.L.R. 833, 843 (1932); 117 A.L.R. 790, 792 (1938); 148 A.L.R. 507, 510 (1944).

[41]Note 34 Colum. L. Rev. 1508, 1517, fn. 59.

[42]29 *Am. Jur., Insurance* Sec. 818, p. 622 and citations. It seems, however, that this matters-antecedent rule would not apply where the non-waiver clause was called to the attention of the insured prior to issuance of the policy, as by insertion in the application. So held in *Abbott v. Prudential Ins. Co.* (1939) 281 N.Y. 375, 24 N.E. 2d 87.

thority, the company is estopped to set up limitations upon the agent's authority in that regard, unless of course the insured knew, or should have known, of such limitations. *Abbott v. Prudential Insurance Co.* (1939) 281 N.Y. 375, 24 N.E. 2d 87.

Some courts have gone the length of holding, however, that a non-waiver clause may itself be waived and this apparently by the very agent whose authority was limited by a non-waiver clause. Thus in *John Hancock Mutual Life Insurance Co. v. Schlink* (1898) 175 Ill. 284, 51 N.E. 795, in the face of a "good health" clause, the company's soliciting agent delivered the policy although he knew the insured was then afflicted with typhoid fever. The policy contained a non-waiver clause. Notwithstanding this, the court held (51 N.E. 795, 796):

> "While it is true that the policy provides that no person except the President or Secretary is authorized to make alterations, discharge contracts, or waive forfeitures, yet, if Ballance was the agent of appellant, as we think he was, with power to solicit insurance of Schlink, receive the application, forward it to appellant, receive the policy when issued, collect the premium, and deliver the policy, then he had power to waive a condition of the policy."[6]

It may be that this is merely an inartistic statement of the apparent authority doctrine. But if the *Schlink* case means what it seems to say, namely, that an agent can waive his own disability to waive, then in this writer's opinion, the *Schlink* case makes neither good law nor good sense.

In view of the numerous obstacles which unsympathetic courts and juries have raised to the enforcement of "good health" conditions, and the punitive effect which their enforcement sometimes has upon the unsuspecting families of deceased insureds, insurance companies may well question the advisability of incorporating such clauses in their policies. Again, if they do incorporate such clauses, they may decide not to enforce them, except as a make-weight in a case of probable fraud.

If, however, companies are going to continue to use "good health" clauses in their insurance contracts, it is of the first importance that they be set forth prominently in both the application and the policy, so as to avoid charges of "fine printing", or fraud upon the insured. Secondly, the exact import and meaning of these clauses should be fully spelled out, both in the interests of fair dealing and to circumvent, so far as possible, the perversions of meaning which have resulted in many instances from judicial construction of these clauses.

In conclusion, a sample "good health" clause designed to accomplish the above objectives, is submitted for the reader's consideration:

> It is hereby agreed that the policy, herein applied for, shall not take effect unless and until issued by the Company and actually delivered in hand to, and receipted for in writing by, the applicant, or someone on behalf of the applicant at the residence or place of business of the applicant, nor until the full first premium thereon is actually paid. Nor shall this policy take effect unless, at the time when actual delivery and receipt of the same has been completed as aforesaid, the insured is alive and in actual good health. The term, "actual good health", as used herein, means freedom in fact, as well as belief, from any condition of the body, infirmity, or disease, discovered or undiscovered, which seriously affects the general healthfulness of the system, or tends directly to shorten life, entirely irrespective of whether the existence of such condition, infirmity, or disease, was known to the insured at the time of delivery, whether it existed prior to the application and medical examination, and whether it was discovered by the Company's doctors in the course of the medical examination. It is further agreed that the existence, at the time aforesaid, of "actual good health", as defined above, shall be a condition precedent, in the absence of which there shall be no binding insurance contract and the sole obligation of the Company shall be to return the premiums paid on this policy, provided, however, that the Company shall be barred from asserting the absence of good health, after the contestable period, provided in the policy, has expired.

[6] See also *Gunn v. Minnesota Mutual Life Ins. Co.* (1944) 322 Ill. App. 313, 54 N.E. 596.

The Use of Oral Binders

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ONE of the distinguishing features of most agents operating in the American Agency System is their ability to bind a risk. This extremely important right separates them from others less fortunate and is a measure of the trust and confidence companies place in them.

It takes little imagination to realize that a few irresponsible or careless agents could play havoc with their companies by misusing this necessary tool; even in the face of the obvious dangers inherent in the binding system, it flourishes and will continue to.

Sometimes one hears that the binding authority of the agent, as set forth in the agency agreement, is not as clearly expressed as it might be. It is true that the language in the agency agreement, "receive and accept proposals for insurance", has been variously interpreted, not always confirming the agent's authority to bind.

Take, for instance, the decision in *Rauschenberger v. Mutual Benefit Fire Ins. Co.*, 363 Pa. 119, 69 A. 2d 83, where on November 14, 1949, the Supreme Court of Pennsylvania held that the words "receive and accept proposals for insurance" did not give the agent the express or implied authority to enter into any binding contract on behalf of the insurance company. Naturally, the foregoing is over-simplified but, however one explains the case, it is still there as a cloud on the horizon.

On the other hand, take a look at *Lumbermen's Mutual Ins. Co. v. Slide Rule & Scale Eng. Co.*, 78 F. Supp. 394, where the U.S. District Court in the Southern District of Illinois, on September 2, 1948, came to the irreconcilably opposite conclusion. In interpreting the same words, the court at page 399 said: ". . . Collins (agent) had express authority to accept risks and issue policies and must be held to have had authority to bind. . . ."

While the pronouncements of the courts (even when opposed) are important to us, it does seem that if one looks far enough, he can find authority for his side of a discussion and perhaps even find a well-considered court case to "prove" his point.

To be candid, the agency agreement isn't as definite and certain as it could be, but it has served well for years without number and this, in a measure, attests its virtue. The agreement does not make a fetish of detail, treating its various provisions with the broad brush of generality. This characteristic undoubtedly allows for flexibility and for the wider use of the powers contained therein. The general approach prevents the agent from being straightjacketed in connection with his representation, allowing him reasonable freedom from a set pattern.

Regardless of the opposite conclusions reached in the *Rauschenberger* and the *Slide Rule* cases referred to above, it is undoubtedly true that most insurance agents have binding authority whether or not they receive it from the exact verbiage of their agency agreement, or whether it is derived from acquiescence on the part of the companies in a course of conduct and from a relationship sometimes extending over a great number of years.

So even though the details of the binding authority of the agent are not delineated in the agreement, we all know that agents enjoy this privilege—it mattering little from a practical standpoint whether we enter the palace through the side door so long as we are finally inside.

As we all know, privileges granted on a broad base bring responsibilities together with some difficulties. The privilege of binding one of the companies to a risk is no exception. Even though the rules are not set down in the agency agreement, they are nonetheless in existence, to be violated only at the agent's very great risk.

While great care must be exercised in the use of written as well as oral binders, it is the latter type which has been the subject of most of the litigation and question. This is only natural because there is always a proof or evidence problem in establishing a parol or oral binder which is not generally present where a writing is available to demonstrate what was agreed to. Then too, the various situations, almost

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without number, in which oral binders could be used, not only attest to their practical importance, but are a yardstick of the difficulties which may be inherent in their use.

It is probably a reasonable statement that most insurance contracts start with an oral binder. True, most of the binders are reduced to writing within a very short time, but some are not formalized before the subject matter of the binder is destroyed by the peril insured against. It is in these situations that the authority of the agent to bind and the efficacy of what is called an oral binder, are most likely to be tested. And whether or not the essential elements of a contract are present is, in most of these situations, the question which the courts often find difficult to answer, rather than the extent of the agent's authority, which is inquired into but ordinarily resolved without too much trouble.

It may be of some value to consider that the law allows contracts of present insurance to be made orally; such unwritten contracts would hardly be expedient on a permanent basis and have as their true function the supplying of interim insurance until the transaction can be formalized by a writing (Vance on Insurance, 3rd Ed., p. 218). The fact that such agreements are generally enforceable if consummated orally does not mean that all the elements of a contract are not required to be present.

If oral binders were not legal and available for use by agents generally, it is certain that because of their importance in the scheme of things, some legal way would have to be found which would allow their use or the use of an alternative method to achieve the same result. As might be expected, this is no new discovery; the United States Supreme Court in 1876 in the case of *Eames v. Home Ins. Co.*, 94 U.S. 621, 627, 24 L. Ed. 298, had this to say: "If parties could not be made secure until all the formal documents were executed and delivered, especially where the insuring company is situated in another state, the beneficial effect of this benign contract of insurance would often be defeated and rendered unavailable".

Also in *Franklin Fire Ins. Co. v. Colt*, 20 Wall. 567, 22 L. Ed. 423 (1874), the court stated: "It would be impracticable (for a company) to carry on its business in other cities and states, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. . . . Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies."

Perhaps enough authority has been established for the proposition that oral binders are, generally speaking, legal and occupy an almost indispensable place in the property and casualty world. There need be little concern for the authority of the average agent to bind and if it were not for one consideration, the problem of oral binders would largely disappear. It will be recalled that earlier it was stated that there is an absolute requirement, in an oral as well as a written binder, that all the essential elements of a contract of insurance be present, which is another way of saying that there must be a meeting of the minds on *all* essentials.

Here then is the area of the difficulty; ordinarily oral binders present little problem from a legal standpoint provided they are executed correctly, which means, among other things, with common sense.

Let us see how this works out in real life by reviewing some of the cases which have been litigated. These doubtless will help us to understand the problem and to avoid similar difficulties.

To have an effective, legal oral binder there must be an understanding on the following essentials: subject matter; the risk insured against; the rate of premium; duration of insurance; the amount of insurance; and the identity of the parties. *Campbell et al., v. Aetna Ins. Co. et al.*, 269 S.W. 2d 292, Kentucky Court of Appeals, June 18, 1954, discussed hereinafter.

Many will probably recall the excitement and consternation caused by the newspaper report that a federal court had held that companies are not liable for loss prior to the delivery of the policy. Agents saw their world tumbling down around them if this decision really meant that the binding authority of agents was a valueless and meaningless thing. After the smoke cleared away, it was recognized that the worst had not happened and that the case's result could be explained within long-understood principles.

The case causing all the excitement was *Gandelman v. Mercantile Ins. Co. of America et al.*, 187 F. 2d 546 (1950) and 90 F.

Supp. 472 (1951), commonly known as the "Okay, Sidney, you are covered" case.

This case has almost unbelievably complicated facts, in addition to two relatively abstruse opinions, one in the U.S. Court of Appeals, and the other in the district court. On top of a very unusual problem concerning the substitution of insurance policies, we have superimposed what looks like a simple oral binder.

The principal point at issue was the character of two policies of insurance—did they represent additional insurance, or were they intended to replace existing insurance? In my opinion the district court opinion (90 F. Supp. 472) gives more light on this problem than the appellate court (187 F. 2d 546) and inasmuch as they both arrive at the same place, little will be lost by following the path of least resistance.

We are primarily interested in the oral binder phase of this controversy and it is believed that this feature of the case is severable from the other and more complicated considerations.

The plaintiff Gandelman insisted that there was an oral contract of insurance. He testified that he called the agent on the telephone and ordered an additional $25,000 insurance and the agent replied, "Okay, Sidney, you are covered".

After stating that the law appears well settled that "a parol contract is valid and enforceable," the court continued to say at page 476, "It is crystal clear . . . that the short telephone conversation between the plaintiff and the agent Oelsner did not constitute an oral contract of insurance. In said conversation no company was mentioned. This alone is fatal (citing cases) . . . Plaintiff already had 100% coverage with the National and if he had complied with the provisions of the National policy his entire loss would have been covered plus additional insurance of $25,000. There is no indication that the plaintiff sought to over-insure. . . ."

Many persons will doubtless feel that the court was rather summary with an individual who found himself in a difficult situation. The district court also recognized that by saying at page 477, "I realize that the courts are unusually sympathetic to the causes of the insured and if a theory can be found that enables them to hold against the insurer, there is a tendency to do so. In the case at bar, the plaintiff is seeking to recover from the defendants for a loss occasioned by his own neglect in failing to comply with the terms of a policy, which, if they had been complied with would have afforded him full coverage".

It is of the utmost importance here to note that the binding authority of an agent was not challenged by the insurance companies involved. However, and this is important, whether or not all the essentials of a contract were present was examined closely by the court which decided that, among other considerations, there was no contract because of the failure properly to identify the parties; which is the effect of neglecting to mention the insurance company in the purported binding conversation.

So the "Okay, Sidney case" is on solid ground even though it may be thought that the court was incorrect in its conclusion. Let me hasten to say that another court of equal dignity has refused to follow this decision, which clearly indicates our wanderings have ended in a controversial field. However, the "Okay, Sidney case", whatever its shortcomings, seems to follow the rules and does substantial justice.

Let us leave the *Gandelman* case with its somewhat unclear opinions and note some of the other cases which have been decided. Cases in this category arise with regularity; this is a field where there is really nothing new under the sun—at least from a legal point of view.

One of the focal points around which the validity of oral binders swirls is the question of the identity of the insurance company in which the risk is bound. This one point has apparently caused more than its share of difficulty and the attitudes of the various courts should be briefly examined to see if any direction is contained in their pronouncements.

Back in 1927 in *Aetna Ins. Co. of Hartford, Conn. v. Licking Valley Milling Co.*, 19 F. 2d 177, the court decided in favor of the insured over the company's contention that, as a matter of law, no valid *written* contract of insurance was made for lack of delivery and no valid *oral* contract for lack of agreement as to (a) company in which the insurance was to be placed; (b) the duration of the risk; (c) the amount of the premium; and (d) the subject of credit to plaintiff for the premium.

The court, after citing authorities, stated that it was the policy of the courts to show a liberal tendency in sustaining oral contracts of insurance. This court quoted from

Eames v. Home Ins. Co., 94 U.S. 621, 24 L. Ed. 298, where at page 629 there appears the following: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount and the rate of insurance is ascertained or understood and the premium paid if demanded". As we proceed it will become apparent that it may not be wise to be lulled into a sense of security by the admitted liberality of the *Licking Valley* case.

Twenty-one years later in *Lumbermen's Mutual Ins. Co. v. Slide Rule & Scale Eng. Co.*, 79 F. Supp. 394, the court held valid insurance had been effected orally, if the agent had authority to bind his principals, even though he had not disclosed to insured the specific insurer which would carry the risk. The court cited the *Aetna v. Licking Valley* case, *supra*, with approval for the proposition that the identity of the insurance company need not be disclosed to the insured in these situations.

Everything seems to be proceeding up to this point as if this general subject were entirely consistent, logical and relatively easy to understand. The next case will add to that illusion.

In 1951 the U.S. District Court in Tennessee decided the case of *Heatherly v. Sun Ins. Office, Ltd.*, 100 F. Supp. 376, which, as you might expect, had as its point of controversy the validity of an oral binder.

This court cited the *Licking Valley* and *Slide Rule* cases, *supra*, as authority for its decision that it is not necessary for the insured to know which insurance company is on the risk in order to effectuate a valid binder.

On page 377 the court quotes from the appeal in the *Slide Rule* case, 177 F. 2d 305, 309, as follows: "It is said that the parties' minds did not meet upon the names of the companies to be bound. We think this wholly immaterial under the facts and circumstances of record. When the agent represents several companies and selects certain of them to be bound by the risk, he is contracting for undisclosed principals. Each of the companies he represents has entrusted him with the agency, and must be held to have given him authority as such agent to select it as the one to bear the risk. Such authority springs inevitably from his authority to make insurance contracts. The insured cannot be permitted to suffer because the agent fails to disclose at the time of making the contract which of several principals he binds."

This court also pointedly disagreed with the Federal Appeals Court which had decided the *Gandelman v. Mercantile Ins. Co. of America* case, better known as the "Okay, Sidney, you are covered" case. You may recall that in *Gandelman, supra*, the lower court (90 F. Supp. 472) at page 476 stated: "It is crystal clear to me that the short telephone conversation between the plaintiff and the agent Oelsner did not constitute an oral contract of insurance. In said conversation no company was mentioned. This alone is fatal". (citing cases)

It was on this point that the court in *Heatherly v. Sun Ins. Office* disagreed with *Gandelman* and it does seem certain that the degree of difference is spectacular.

Perhaps it would be well at this point to look over the score card to see where we stand. In *Aetna v. Licking Valley*, *Lumbermen's v. Slide Rule*, and *Heatherly v. Sun*, we had examples of the broad, generalized and liberal approach to the problem. In *Gandelman* we see the other side of the coin. You will see that in the two cases which we will discuss (I believe they are the latest on the subject), the scales are tipped very dramatically toward conservatism—so much so that the Superintendent of Insurance in the state of New York thought it in the best interest of all concerned to issue a memorandum on the subject dated April 1, 1952, which we will briefly discuss later.

One of the reasons the superintendent felt constrained to act was the effect of a decision of the Supreme Court of South Carolina on March 6, 1951 in *Dubuque Fire & Marine Ins. Co. v. Miller et al.*, 64 S.E. 2d 8, 219 S.C. 17.

This was an action brought by *Dubuque* against its agent to have a fire policy cancelled.

The local agents in this case gave oral binders to insure the contents of a restaurant in the sum of $25,000 against the peril of fire. No mention was made as to which companies were bound. Fire destroyed the risk two days later, after which the local agent wrote a policy for $2,500 in each of 10 companies represented by it.

The court held, on the point of greatest interest to us, that the fire policies were void because of failure of the oral binder to designate any company as an insurer. However, the insured was protected as the court decided that he could collect his loss

because there had been a ratification of the agent's act by *Dubuque* when its general agent accepted and retained the applicable premium.

Nevertheless, it must be borne in mind that this court has unequivocally adopted the view that the definite designation of a particular company is necessary if one would orally bind it to a risk, and there probably would have been no insurance if ratification of the agent's act had not occurred.

This South Carolina court has announced the law as it is in that state and as it probably is in some others. The plot is thickening and it becomes more apparent why the former Superintendent of Insurance of New York state thought some advice to producers on the handling of oral binders would not be amiss in order that assureds would be properly protected.

Before we discuss that, let us look at a recent case.* It is *Campbell et al., v. Aetna Ins. Co.,* 269 S.W. 2d 292 (June 18, 1954), and is a pronouncement of the Kentucky Court of Appeals.

This case goes beyond our hitherto limited problem of whether or not it is absolutely necessary for the validity of an oral binder to designate an insurance company specifically for all or part of a risk.

This case also points up very strongly the necessity of agreement on all the essentials which we previously listed. The oral agreement in this case was declared invalid because it failed to include the following: (1) amount of insurance, (2) the rate of premium, and (3) the identity of the parties. This was an $118,000 loss, with the plaintiff *Campbell* attempting to establish his right against 20 companies which were alleged to have been bound on the risk. The facts are very complicated but this case can be reduced to its salient points for easy understanding.

The court found that in addition to the fact that the amount of fire insurance was not mentioned or agreed upon, there was also a major difference of opinion whether the insurance alleged to have been bound was "Builders Risk, Completed Value", or "Reporting Form #17".

The rate of premium was not agreed upon and this proved to be one of several fatal weaknesses. Ordinarily the rate can be ascertained with relative ease because the rates on specific property in any particular community are uniform and standard. Also the law generally implies a promise to pay whatever premium is so chargeable. This very handy and sensible rule was inapplicable here because, it will be recalled, the kind of insurance had not been agreed upon.

In addition, the court found that the agent had not stated that any certain amount of fire insurance would be placed with any particular company represented by the agent, and for this reason the contract failed for lack of identity of the parties. It should now be obvious that the more recent cases are as conservative as they are current.

While every right thinking insurance agent would subscribe to the concept that the rules of the business should be followed, it is only natural that the same agent can't be expected to conform unless and until he knows what the rules are.

The former New York Superintendent, the Honorable Alfred J. Bohlinger, in his memorandum promulgated after the decision in *Dubuque Fire & Marine Ins. Co. v. Miller, supra,* stated that there are at least five minimum precautions which should be observed when agents effect oral binders. These, quoted directly, are as follows:

"1. The agent should review all his agency contracts to make certain of the authority to bind his principals. If such authority is limited, the binder should be limited accordingly. Such limitations should be conveyed to the insured, who should be clear as to the commitment being made.

"2. Agreement on all of the essential terms of the policy to be issued.

"3. A confirming written binder should be issued and delivered to the insured whenever it appears that there will be a delay in the issuance of the policy.

"4. Immediately upon making an oral binder, the agent should make an appropriate record preferably on printed consecutively numbered forms, which will contain all the essential terms of the contract including the exact time of day the binder was made.

"5. Writings should be reported immediately by the agent if this is his company's practice."

*Additional recent cases in connection with Oral Binders which may be of interest are *Farm Bureau Mut. Auto. Ins. Co. v. Bobo* (July 19, 1954) No. 6814, United States Court of Appeals, Fourth Circuit, 214 F. 2d 575; *Mackwiz v. Resolute Ins. Co.* (Sept. 2, 1954) No. A-8606, Federal District Court, Alaska, Third Division, Anchorage, 123 F. Supp. 142.

There is real danger here for the agent. An aftermath of the *Dubuque* case which we discussed, and which incidentally ended favorably for the insured, is the instituting by the insurance company of a lawsuit against its agent for damages sustained in paying the claim which the company did not believe was bound. This suit, which is presently being litigated, proceeds on the theory that the agent failed to follow instructions which allegedly prohibited agents of the company from insuring this type of risk.

Inasmuch as the failure to designate the insurance company providing the insurance seems to be the most frequently debated point in these discussions (and in some cases the failure to name the company resulted in a failure to effect insurance), *each* agent should overcome this troublesome point by informing the applicant in such cases which of the agent's companies is to provide the coverage. If this one point is covered carefully, a significant forward step will have been taken. Insurance agents, in the main, handle their business with efficiency and knowledge. They are well-informed in relation to their profession. There is no reason why the subject of oral binders has to be an exception—and it will not continue to be an exception if care and thought are exercised.

The Outlook In The Liability and Compensation Fields In California*

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WE are so accustomed to billion dollar figures that I apologetically call your attention to the fact that in 1955 the workmen's compensation premium volume in California was $159,789,533. This figure was an increase over the 1954 premium volume of about $4 million but did not quite reach the overall high year of 1953, when the total premium volume was in excess of $162 million. Industrial production incidental to the Korean War was to some extent responsible for the high payrolls of 1953. However, there appears to be no substantial drop in employment, according to the current available statistics, both state and federal. The decrease in compensation premiums can be explained by the fact that there have been decreases in rate every year for the past three years.

Statistics are boresome things to most of us unless they pertain to our pay check or our bank balance. However, we are so accustomed to measuring progress in business fields by the dollar yardstick that often there is no other way of illustrating the standing of a business or an industry.

In 1954 the state premium income for all lines was $1,911,000,000. The complete figures for 1955 have not as yet been tabulated by the Insurance Department but that department assures me that the total will exceed 2 billion dollars. California is the second state in the Union in point of premium volume, being exceeded only by New York.

The biggest premium producer is life insurance, with a premium volume of $680 million. Other lines which produce large premium volumes are:

Liability—all lines: $334 million.
This can be broken down as follows:
B.I. $181 million
P.D. $90 million
B.I. other than auto $52 million
P.D. other than auto $11 million
Next in premium volume is disability with $244 million; then
Automobile (physical damage) $176 million;
Workmen's compensation – $159½ million ($155 million for 1954)
Fire and extended coverage—$146 million, of which $124 million is fire and $22 million is extended coverage.

These are the 1954 figures with the exception of compensation which is the of-

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ficial figure for 1955. These figures illustrate the importance of the insurance business to the economic welfare of the state, as well as to those in the business of insurance.

California and the west will continue to grow. With growth will come increasing premium volume and increasing problems. It is only natural for those to whom the welfare of the insurance business is of vital concern to ask: "What are the prospects for the business in the immediate future and what problems can be reasonably anticipated?"

I don't pretend to know the answers to these problems and I don't believe that anyone can predict the future experience of the insurance business in California with any degree of certainty. All I can do will be to express my personal opinion as to what the trend appears to be in the casualty and workmen's compensation fields.

Compensation insurance was from the very beginning a form of social insurance. Its genesis lay in the deep feeling of the nation that the system of measuring the value of injuries to workmen by the master and servant negligence system was outmoded and that industry should assume the burden of repairing damages to life and limb as part of the cost of doing business. The element of fault was eliminated and instead a fixed percentage of the employee's weekly wage during disability was provided for. The history and the reasons for the workmen's compensation idea are well known to all of you and I mention it only to illustrate that the compensation system as we know it was evolved as an answer to a social problem that needed solution.

To a much more limited extent, emotional and social forces affect the casualty liability business and particularly the automobile liability business. I am not going to tell you that we have too many automobile accidents in California and that the problem of preventing accidents not only in California but in the nation must be met. You are familiar with the horrifying statistics. The best minds in the nation are working on the problem but as long as our highways are overcrowded with fast moving automobiles we will continue to have accidents to the automobiles themselves and their occupants.

The present situation has been accepted by the public only because of the existence of liability insurance in the great majority of cases. Due to inflationary conditions (increased medical, auto, repair costs and jury verdicts) the cost of liability insurance, both bodily injury and property damage, has risen in the last decade. The increased sale of medical payment insurance has brought financial relief to the traveling public and peace of mind in most cases to the operator of the automobile in which the injured persons were riding. The public has been educated along insurance lines and in general has come to expect its financial problems due to unexpected contingencies to be solved through insurance. To date the insurance industry has done a magnificent job through insurance in solving the question of payment for injuries sustained either by automobile or street, store or sidewalk injuries. Due to both inflationary conditions and a sharp increase in claim consciousness on the part of the public, the cost of liability insurance, although it may vary from year to year, has been on the increase.

The public seems to expect to be paid for every accident if insurance exists. In fact, it has reached the point where a guest who, through his or her own carelessness, spills food or drink on his clothing and in the process ruins a dress or suit, will often ask the host if he carries insurance which will enable the guest to collect for the damage to the guest's clothing. If the host has no insurance, the guest forgets about his loss as it would be bad manners and poor taste to ask the host to pay. However, if there is insurance, the guest will often expect the insurer to pay the loss irrespective of the fact that the host has no legal liability.

I mention the claim consciousness of the public only to point out that the public has in a way arrived at a point where it expects the insurance business to solve all its economic ills. While this feeling on the whole is complimentary to the insurance business and a challenge which the business is trying to meet, it is unrealistic because it assumes that there is some magic to the law of large numbers which insures a profit to everyone providing the number of persons insured is sufficiently great in number.

Not so long ago, automobile and liability rates were so low that many companies lost so much money on automobile business that the insurance authorities throughout the nation realized that the companies had to sharply increase rates to insure continued solvency. Fortunately, our system of insurance and our supervision of insurance by the various state insurance commissioners was and is strong enough to prevent irreparable damage to the business of insurance. Following this period, a reasonably profitable period existed in the automobile business. Competition has of recent years brought about such a reduction in collectible premiums from automobile business that the industry is now confronted by a condition which needs careful watching. Some carriers have already increased automobile and general liability rates. At the same time competition between direct writers and agency companies is increasing so that the competitive gap is getting closer and closer. Exactly what the future will bring no one knows, but with present loss ratios and the prospects of more and not less competition, the immediate future will demand increasing vigilance on the part of all insurance company managers in the liability field. I am not pointing with alarm; I am only saying that if the business has been tough this past year it is going to be tougher before it is better.

Before I am asked whether I think that the present liability system as it affects traffic accidents will be supplanted by a system patterned after the workmen's compensation system, let me say that I do not believe this will happen or that if such a law were enacted it would be acceptable to the general public.

This is not a new idea. It was suggested in California prior to 1920. Perhaps it would have been acceptable at that time but the cost of such a system makes it impracticable and the benefits which would be paid would be inadequate and unacceptable to the majority of injured persons. This is a large subject in itself and I will not discuss it at this time. From time to time the idea, although not new, is repeated and much discussion follows in the public press. The most recent example was an article in the Saturday Evening Post by a New York judge advocating such a plan. No cost or probably benefit figures were mentioned and a study of the article showed that the judge, although learned in the law, had not given the subject much thought from a practical or insurance viewpoint. He thought such a plan would eliminate litigation and be a benefit to the public, but he made no suggestions as to how the plan would be made effective.[1] What surprised me was the fact that so many persons thought the suggestion a brand new idea.

On the compensation side, it is permissible to make one statement which has implications for the future, and that is that benefits, both by act of the legislature and by interpretation by the Industrial Accident Commission and the courts, have greatly increased since the compulsory workmen's compensation act went into effect on January 1, 1914. It should be kept in mind that compensation insurance is a form of social insurance and its development on a benefit level depends on many factors which have no direct connection with the insurance business itself. What the benefits will be is primarily a question to be decided by the employee and employer groups. There was a time when employers objected to increased benefits merely because they cost more money. Such an argument is no longer tenable and as a matter of fact enlightened employers do not oppose benefits on this ground. An employer may argue that benefit increases are theoretically desirable but point out that he cannot compete with a similar industry in a neighboring state if the benefits in the neighboring state are greatly lower than California.

Recently, a Congressional House Committee recommended the following increases in the Federal U. S. Longshoremens & Harbor Workers' Compensation Act: An increase in weekly benefits from $35.00 to $54.00; an increase in minimum benefits from $12.00 to $18.00 a week; an increase in the death benefit to $28.35 plus $12.15 for each child a week and a raising of the total amount payable for non-schedule and schedule injuries from $10,000 and $11,000, respectively, to $17,280.00. This bill passed the Senate last year and will be passed in some form by the House. It will then go to conference

[1] See "Compensation and the Automobile", by Gordon H. Snow, XXIII Insurance Counsel Journal, 161.

for concurrence. The bill is supported by the U. S. Department of Labor and by both the A.F. of L. and the C.I.O. Labor is aiming at a $50.00 weekly benefit. What amount will be decided upon no one knows, but a substantial increase appears to be inevitable. If an increase in weekly benefits is made in the U. S. Longshoremens & Harbor Workers' Act, you can be certain that a demand for similar benefits will be made in every state as soon as its legislature meets.

From a rating viewpoint, it is difficult to forecast the accuracy of future compensation rates. For many, many years the rating procedure was way behind in its forecast. Its statistics, although accurate, were too old. Five years' experience on a policy year basis was used, which meant that the latest available experience was on the average 4½ years old and as much as 7 years old when compiled and therefore the corrected rates would be based on statistics which were on the average 5½ years old and as much as 8 years old during the period rates based on this experience were effective.

This brought about a situation where the insurance carriers collected in rates more than they actually needed at some periods and at other periods received substantially less than adequate rates. Thus, if the business were profitable over a period of years, rates would go down to such an extent that the business would become unprofitable. Then if it continued unprofitable for a period of years, and statistics showed that the insurers lost substantial amounts of money, the rates would be substantially increased so that they would eventually become more than adequate. Employers were in general protected by various return premium plans which returned the excess of premiums, so that on the whole employers were not hurt by the system. Carriers, however, did not like a system which called for either a feast or a famine and individual insurers suffered great financial loss in certain years.

One illustration is the experience of the carriers who originally wrote compensation in California and generally throughout the country from 1914 to 1920. Confining my remarks to California, I might say that in the beginning the deposit premiums were so low that the loss ratios appeared to be unreasonably high and many companies after a few years' experience, quickly retired from the field. However, the years preliminary to World War I and the war years themselves produced such an increase in payrolls that the additional premiums occasioned by this increase produced a period of great prosperity for the carriers that remained in the field. Insurers that had retired from the field and other companies which had not yet written compensation insurance decided that this was a good business to be in, so beginning about 1921 or 1922 a great many insurers entered the field on a national scale. There followed a disastrous period of about ten years duration of very high loss ratios, due to the fact that the rate structure was not sufficiently developed to forecast an accurate rate.

World War I brought about a mechanization of industry which greatly reduced payrolls and at the same time increased the hazard. Machinery took the place of many men, thus decreasing the income to the carriers. At the same time, injuries, instead of being minor cuts and bruises, became major accidents due to injuries caused by tractors and other machinery which had theretofore not existed.

Beginning about 1932, due to the influence of the high loss ratios in the preceding years, the rate level reached a high where it was more than adequate and substantial profits were made in the compensation business, which continued for several years. Then followed beginning about 1949 three years which were extremely bad for most companies, particularly in California. Bad experience produced an increase in rates which after a period of three years corrected the rate level and eventually produced rate reductions. There have been rate reductions each year for the past three years and we may have reached the end of a cycle where compensation rates may not be adequate for 1957 and coming years.

Although you are all familiar in general with the method of making compensation rates, it may be of interest to check over the rate making system in order to refresh your minds.

The California Inspection Rating Bureau, a licensed rating bureau to which all workmen's compensation insurance carriers must belong, compiles and studies the experience of all carriers and presents its

findings to the Insurance Commissioner in the form of rate recommendations. In general, rates are made by keeping an injury record of the various classifications of industry and the payroll for those classifications are compiled and the losses are divided by payroll and a rate obtained in this manner which is sufficient to pay out these losses, assuming the same loss percentage will occur in the future. To this figure has to be added a sum sufficient to take care of the overhead and taxes for the insurance carriers concerned. To make the rates chargeable current with existing conditions, rating authorities generally in the United States use the last two policy years' experience and the last calendar year's experience. No longer do they go back into ancient statistics to make current rates. This method, while not perfect, gives much better results than the old system of rate making. It brings into consideration losses and payrolls the latest of which are less than a year and a half old at the time they are considered for rate making purposes.

Is the workmen's compensation business becoming more competitive? I cannot answer this from personal experience, but the underwriters and producers throughout the business insist that it is. I do know that the entire insurance business is going through a cycle or phase of increased competition along all lines. Most companies of any size are engaged in multiple line operations. The trend toward packaging more coverages under one policy is growing. How far it will go and what will be the final impact on the insurance business, no one knows. You are probably a long way off from that theoretically perfect situation where a buyer of insurance can obtain a slip of paper that says that "We will protect you against all perils up to the sum of $ _____. We will charge you either a flat sum for this coverage or we will make an audit of your operations at the end of the year and tell you how much you owe us."

Some underwriters say that this is the end to be hoped for and expected under multiple line operations. However, it is rather early to make such a forecast because the experience of combining risks has not lasted long enough to produce statistics upon which anyone can make a reliable prediction. For example, prior to last year's floods in California, there was a tendency among some carriers to regard probable flood damage in California as a remote contingency and not worthy of much thought from an underwriting viewpoint. Accordingly, a few carriers expanded their home owners coverages to cover incidental flood loss. The losses of these carriers was so great in this connection that it caused all other carriers to stop, look and listen before expanding their coverage along this line.

The insurance press indicates that some of the most ardent advocates of block policies concede that there are many facets to the problem which have not been adequately considered. Basically, insurance is written on a named peril basis. Inland marine insurance is written on an all peril basis with exceptions. An inland marine policy usually covers everything except that which is specifically excluded. When you attempt to draw such a policy, the underwriter realizes that if he is in a new field that he must do a lot of thinking before he commits his company to such a risk because he may be covering risks which he does not know exist. While compensation insurance took over the field of employers' liability insurance in California, other types of social insurance which have developed since then, such as disability insurance and the State and Federal Governments' so-called Unemployment Insurance continue in their present forms and their experience and rate structure continue to be kept separate. They will continue to be treated as separate problems even though there are those who predict that eventually they will all be combined so that a person who is not working will receive certain benefits irrespective of cause. Theoretically, it would save a great deal of money and it would eliminate law suits, litigation expense, etc., if an employee were entitled to a fixed sum per week irrespective of the cause. However, when it comes to assessing the cost of such a program, difficulties arise. Employers are willing to pay any reasonable cost which is directly attributable to their industry, but do not want to be saddled with burdens which do not belong to them individually or to their business; therefore the tendency has been and probably will continue to be to keep such forms of insurance separate because the

cause of economic loss due to loss of wage earning capacity is different from that due to illness or unemployment.

The decisions of the courts of this state and the United States courts have over the years been increasingly liberal. There is a provision in the Labor Code which states that the law shall be liberally construed by the courts for the purpose of extending the benefits of the compensation law to persons injured in the scope of their employment (Sec. 3202, Labor Code). This section is constantly referred to by the courts as indicating the social policy adopted by the legislature. In fact, the courts have probably gone much further along this line than the legislature ever intended. The doctrine of liberal construction guides the Industrial Accident Commission and the courts and is referred to in cases of doubt. When a provision of law is capable of two constructions, one of which will give compensation to the injured man and his dependents and the other will deny compensation, the courts and the Commission will invariably adopt the liberal interpretation.

An indication of the trend of the decisions of the court is the case of *Reinert vs I.A.C.*, 46 A. C. 347, 294 p. 2d 713, decided by the Supreme Court of California on March 20, 1956. The original decision by the Industrial Accident Commission and the District Court of Appeal held that a girl scout counsellor at a summer camp who was severely injured while riding a horse while on her own time and off the camp premises was not entitled to compensation. This decision, which was reversed on March 20, 1956 by the Supreme Court, was a 4 to 3 decision. The decision indicates the attitude of the courts in extending benefits of the compensation act.

Another case which may be of interest is the case of *Westvaco vs I.A.C.*, 136 A.C.A. 78, 288 p. 2d 300, which extends a carrier's potential liability beyond the five year period. Prior to this decision, it was generally believed that an injured employee was required to amend an award to provide for a permanent disability rating or petition for new and further disability within five years from the date of his injury. While this is still the general rule, under the court's ruling in the *Westvaco* case, the probability that petitions for additional compensation will be filed after the five year period now exists. The cases mentioned are only two examples of scores of cases that could be cited to show examples of the extent to which a carrier's liability under workmen's compensation policies is expanded by the decisions of the courts. Rates which do not anticipate such changes are to that extent inadequate.

If the legislature changes the law, the carriers obtain an increase in rates sufficient to offset the increased liability. When the courts change the law by judicial construction, no rate increase is received by the carrier. The effect of decisions expanding the benefits of the act is considerable and substantial from a financial viewpoint.

No discussion of the probably future of the compensation business in California would be complete without reference to the Supreme Court's decision in the case of *State Compensation Insurance Fund vs McConnell*, 46 A.C. 328, 294 p. 2d 440, decided March 2, 1956, which upheld Ruling No. 67 which approved the Retrospective Rating Plans and the Premium Discount Plan. These plans were sponsored generally by the national companies, both stock and mutual, and were opposed by most of the California carriers.

The court's decision became final on April 3, 1956, but the plans have not as yet become operative and cannot be used until the Insurance Commissioner approves the use of endorsements containing the provisions of such plans. Such endorsements will be submitted to the commissioner in the near future. The commissioner has indicated that he wants additional information concerning these plans, so how long it will be before such endorsements are available for use is anyone's guess. In the interim, no one is authorized to use either the Premium Discount or any of the Retrospective Plans and a bulletin to all carriers issued last week by the commissioner puts all carriers on notice that the commissioner will consider the use of such plans prior to his approval of a retrospective endorsement a wilful violation of law.

Retrospective Plans and Premium Discount Plans similar to the plans passed upon by the Supreme Court have been in force for a number of years in states in which many of you do business. You

therefore know much better than I the effect of such plans from a competitive viewpoint. They admittedly reduce the premium collectible on risks over $1000 and to that extent will create more competition on large risks for participating carriers as they will under such plans have competition on some large risks from non-participating stock carriers where no such competition heretofore existed.

While a participating plan can be superimposed on a Retrospective or Premium Discount Plan, obviously the return premium by way of dividend will not on the average be as large as the collectible premium will be smaller. Mutual companies have lived under these plans in other states and urged approval of them in California, so I presume that you do not regard them as a handicap from a competitive viewpoint.

More important, in my opinion, than the possible impact of the Retrospective Rating Plan and Premium Discount Plan is the announcement in the insurance press that some national stock liability carriers are already issuing participating compensation policies and that many others plan to follow into the participating field. Some of the oldest and largest stock liability carriers which have heretofore opposed in principle the participating form of insurance have determined to "give it a try" in California. If their California experience in participating insurance is successful, it is inevitable that the stock companies will use the same plan in more and more states. The advent of the so-called old line stock company into the participating field in workmen's compensation is the most important event that has occurred from a competitive standpoint in California since 1914. Its possible implications are of far reaching importance.

One of the aspects of the court's decision upholding Ruling 67 that was unanticipated was the abrogation of the California Retrospective Rating Plan which had been in effect since 1938. Ruling 67 deleted and eliminated the 1938 plan from the manual. As a result, when Ruling 67 became effective on April 3, 1956, it left California without a retrospective rating plan. The commissioner has announced that all policies written under this plan in effect prior to April 4, 1956, may be continued to expiration. As this was an unintended result, the California Inspection Rating Bureau will present to the Insurance Commissioner for approval a re-enactment of the California plan so as to make sure that some retrospective plan is available for those employers who have heretofore shown a desire for such a plan by taking out insurance under the existing retrospective plan. This will be an optional plan and will have no effect on the retrospective plans covered by Ruling 67.

Another matter in which there is considerable interest is the question of whether or not it is permissible to endorse liability policies to cover compensation liabilty or to endorse compensation policies to cover the liability exposure. A few companies have been issuing these policies; other companies oppose their issuance and the question of whether or not it is legally permissible to issue such policies is before the Insurance Department for decision.

Predictions of things to come stimulate discussions and are of great interest to those who may be affected by the predictions. Every wind that blows and every raindrop affects the liability and casualty business for good or evil. The effect of any happening may be so slight that its consequences are not noticeable. Unexpected floods, windstorms, wars and other major happenings change the picture overnight and turn what is expected to be a good year into a bad business year and vice versa. Leaving aside the possibilities of such unusual happenings, we can only say with assurance that the business of insurance is stabilized to such an extent that nothing is going to happen to the business as a whole that will mortally wound or greatly damage it. Insurance is a business of constant change, which probably explans why it is so interesting and such a challenge to those who live with it and by it. The business of insurance is going through a changing cycle which is bringing about and will continue to bring about great changes. Fire companies are going into the casualty business and casualty companies are going into the fire business. Multiple line insurance makes all lines of insurance everyone's business. Multiple line writing will bring about a development of many new types of coverage and may bring great success and profits to those who first come up with what the

public needs and wants at the right time. On the other side of the fence, we can expect individual companies to have financial headaches due to writing lines in which they have had very little underwriting experience. Experience is a great teacher, but it is also a costly one. All we can say with certainty is that the immediate future in the casualty and compensation fields will be most interesting and that highly competitive conditions will exist.

Lightning Strikes Plaintiff Twice

A. Lee Bradford*
Miami, Florida

LIGHTNING started the law suit, and a jury terminated it.

A suit was instituted in Florida by a husband and wife against a developing organization and a builder who sold his houses with or without stoves and refrigerators, claiming that the wife was injured during 1952 by an electric shock received through a kitchen stove. The case went to the jury against only one defendant—the builder.

Among other things it was claimed that: (1) the pigtail connecting the stove with the wall plug was improperly and insufficiently insulated and taped; (2) the insulating tape used was not designed for that purpose; and (3) the ground wire was not properly secured to the terminal in the stove. There were charges of joint adventure, dangerous conditions, failure to inspect, failure to warn, implied warranty, and about all of the omissions and commissions that a plaintiff's attorney could think of.

It developed that the stove in question was a standard, nationally advertised stove purchased through an intermediary corporation which was not a party to this suit, from a wholesale appliance dealer, and the stove was installed by the appliance people. The contract to purchase the house included the price of the stove.

It was brought out at the trial that several purchasers of homes in this subdivision complained that they had had trouble with their stoves (by not being properly insulated) which were purchased along with the houses. The defendant (builder) admitted that there had been some complaints and that upon receipt of the complaints it had immediately employed an independent electrician to inspect all stove connections in the subdivision and to re-tape those which required re-taping.

The trial lasted two weeks. A jury returned a verdict of not guilty for the defendant. The primary contention was that there was a short circuit in the stove caused by one of the pigtail wires rubbing a hole through the insulation so that the exposed wire came into contact with the metal back-plate, thus energizing the stove, and that the plaintiff, as she worked about the stove barefooted on a damp asphalt floor suffered a severe shock which knocked her across the room when she touched a switch on the stove. The shock resulted in muscle spasms and partial loss of the use of one of her legs. The plaintiffs testified that the injured plaintiff was in the best of health prior to the injury, that there was no lightning or storm at the time of the injury, and that the injury prevented her from engaging in any type of strenuous household work, that she had suffered pain and had to wear a brace on her leg, and that she had been hospitalized on several occasions and had been treated by many doctors.

Twenty-one doctors were called during the progress of the trial. The first doctor who treated the plaintiff immediately after the injury said that he was told that the plaintiff had been hit by lightning and in his opinion the injury resulted from lightning. The plaintiff was admitted to a hospital immediately. The hospital records containing the plaintiff's history also showed that the plaintiff's injury resulted from being struck by lightning. She was hospitalized several times and the light-

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ning history was in several admission records. While in the hospital, the plaintiff was treated by various physicians attached to the hospital, and they had been told that the plaintiff's injuries resulted from being struck by lightning.

Various physicians described the plaintiff's condition as lack of muscle tone in her leg and irritation and damage to the nerves. Some felt that there was traumatic neurosis, and others could not rule out conversion hysteria and neurosis. One physician said that there was damage to the central nervous system. Another physician stated that in his opinion the plaintiff suffered post-traumatic distonya. There were no burns on her body, nor was there any external evidence of the injury.

Six experts were called who examined the pigtail and stove which were in evidence, and who expressed opinions as to whether or not the tape used for insulation was designed for the use to which it was put. The tape had been approved by Underwriters Lab. Some experts said that the tape was designed for this particular purpose and was sufficient. Other experts said that the raw wires should have been first wrapped with friction tape. Others said that the tape was acceptable but there should have been more applied. The lead-in wires to the house had not been damaged. No fuses were blown. One expert testified that this signified that lightning had not struck the wiring leading to the stove. Others testified that lightning sometimes jumps the fuse box and passes on to the stove and that the surge may be so fast that there would be no damage to the fuses.

The defendant apparently proved to the satisfaction of the jury that the stove was properly grounded and that the plaintiff could not get the shock she claimed to have gotten by touching a switch on the stove even if the pigtail had not been properly insulated. There was some dispute in the testimony as to whether or not the ground wire was securely attached to the terminal, but it was definitely established that if the ground wire was properly attached to the terminal the switch on the stove could not be energized even if the pigtail did not have the proper taping on it.

The records of a United States weather station located close to the plaintiff's residence verified a local thunder storm with lightning and rain in the vicinity of the plaintiff's home about the time of the injury.

It was contended by the plaintiffs and partially supported by some doctors that the plaintiff could not get about and would not attempt to go out of the house without a metal brace such as is commonly used by polio victims on her leg. It was also contended that any extension of the arms above the head automatically brought on spasms in the leg which were very painful and totally incapacitated her for a period of time until the spasm could be relieved.

We rented a vacant house in the vicinity of the plaintiffs' home and posted observers with a camera and a telephoto lens, because our investigation had revealed that the plaintiff did not always use a brace and that she was able to do a number of things that she had specifically denied she could do. Fortunately, we were able to secure some very convincing motion pictures of activity on the part of the plaintiff which were absolutely contrary to the testimony she had given on a discovery deposition.

We obtained several feet of film showing the plaintiff without a brace in a vacant lot assisting some children in flying a kite. Luckily, she wore shorts while assisting in flying the kite. An even better break came one day when she went out the back door to hang some clothes. She carried a clothes basket and again had on shorts and was not wearing a brace. She extended her arms above her head to affix the clothes to the line and shortly after she completed this job a light drizzle started which required prompt action to prevent her clothes from getting wet again. She came out of the back door in shorts, again without a brace, and hurriedly gathered the clothes she had previously put on the line. There was no sign of a spasm and no one assisted in the work. We obtained some other pictures, but these two instances were the most important part of the film.

We had contended in our opening statement that a part at least of the plaintiff's spasms which she exhibited from time to time, was voluntary or controlled. To refute this statement during the progress of the trial the plaintiff was taken to a doc-

tor's office, dressed in a halter and shorts, placed on an examining table, and there was administered to her a combination of oxygen and carbon dioxide. During the administration of the anesthetic, the doctors made colored film showing muscle spasms throughout her body. The purpose of the administration of the oxygen and carbon dioxide was to attempt to prove to the jury that even when the plaintiff was in a semi-conscious or a totally unconscious condition and had no voluntary control over her body, she had muscle spasms in her leg which she claimed was injured through man-made electric shock.

It was pointed out by the defense that the entire body was in spasms including the facial muscles, abdomen muscles, and the muscles in all extremities. The doctor was then asked to explain the difference in the spasms in the other parts of her body from the spasms in her injured member. Of course, he could not explain the difference and had to admit that all the spasms seen in the colored film were voluntarily produced by the two doctors through the administration of anesthesia. Objections were timely made to the introduction of the film made by the doctors, but the trial judge admitted the film into evidence. While the film was being shown the neurologist and psychiatrist gave a running account of what they were doing when the film was being made. Anesthetists were called by the defendant who testified, without dispute, that the moving pictures reflected what could be reasonably anticipated from the administration of such an anesthetic.

The pictures made by the physicians administering the anesthetic to the plaintiff were really shocking even though the physicians explained that the plaintiff was not in agony, but the muscle contractions and writhing made it appear that she was in severe pain. No one but the defense counsel was actually suffering pain at this time. By the time the pictures were completed the defense counsel was writhing almost as much as the subject was in the pictures. There is a good likelihood that these pictures backfired on the plaintiff because on cross-examination the plaintiff's doctors had to admit that the spasms in all parts of the plaintiff's body were similar and they could not distinguish the spasms in the allegedly injured member from the spasms in the uninjured member.

There were fifty-eight exhibits put into evidence and twenty-one doctors were called to the witness stand. There were also six electrical experts called. Approximately one day was consumed in argument to the jury, charges, and deliberation.

After the jury verdict for the defendant, the plaintiff's moved for a new trial. The trial judge denied the motion and a final judgment was entered for the defendant. The court also taxed as costs against the plaintiff some of the defendant's expenses which totalled $569.80.

The plaintiff had requested one charge to the effect that if the appliance dealer who installed the stoves was negligent and that his negligence proximately helped to produce the plaintiff's injuries, then the defendant sued would be responsible to the plaintiffs for damages. The court gave this charge. After the court refused to grant a new trial, the plaintiffs then filed a new suit against the wholesale appliance dealer claiming the same injuries and the same negligence set up against the builder in the first suit.

The appliance dealer, who had no insurance coverage, requested us to represent him. We filed general denials and set up, by way of estoppel and res judicata, the judgment against the plaintiffs in the prior suit based upon the same injuries and the same accident. The court entered a summary judgment in favor of the defendant after which the attorneys representing the plaintiffs withdrew. New attorneys for the plaintiffs perfected an appeal from the final judgment for the defendant in the second suit. Pending that appeal, a settlement was made with the plaintiffs by compromising the cost of judgment of the first suit and satisfying the same in consideration of dismissal of the appeal from the second judgment.

The storm has passed and the sun is out again.

Liability To A Social Guest

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IN recent years there has been an increasing number of cases before the courts involving the liability of the host to a social guest. No doubt liability insurance is largely responsible for this increase.

The purpose of this article is to discuss the present law and to review some recent decisions which may seem to indicate a tendency toward relaxing a well established general rule.

The duty of care which the owner or occupier of premises owes to another upon his premises is dependent upon the legal status of that person upon the premises. He has always been considered to be either a trespasser, licensee, or an invitee (business visitor).

It is uniformly held that the occupier of premises owes the duty of exercising ordinary care to maintain his premises in a reasonably safe condition for business visitors, or invitees coming upon it. The occupier of premises, however, is practically absolved from liability in connection with the maintenance of his premises if the person entering his premises is classed as a licensee rather than an invitee. It has been said that "mere licensees are about the least favored in law of men who are not actual wrongdoers." 38 Am. Jur. 765.

While a social guest is clearly on the property as the result of an "invitation" in the layman's sense of the word, the authorities have universally agreed that he should not be entitled to the same degree of care for his safety as one who is on the property of another as what is sometimes called a "business guest" or "invitee", that is, for the purpose of conferring some benefit other than purely social. 25 A. L. R. 2d 600 and many cases cited therein.

Since a social guest is not a business guest or invitee, nor a trespasser, he has always been held to be a licensee of some sort.

Furthermore it is said that:

"Minor services performed by the guest for the host during the course of the visit will not be sufficient to interrupt his status as a guest."
25 A. L. R. 2d 607.

In a recent and comprehensive A. L. R. note (25 A. L. R. 2d 600) it was stated:

"Any difficulties arising from the attempts to fit a social guest into the standard classifications of status have affected only the rationalization of the decisions, however, since the results of the cases display a commendable unanimity in holding that a social guest injured by a defect in the premises may not recover against his host in the absence of evidence establishing something more than ordinary negligence in the maintenance of the premises. More specifically, it has been held that a guest can recover only where his injury is the result of active and affirmative negligence of the host while the guest was known to be on the premises, or of the failure of the host to remove or warn against defects amounting to a trap or pitfall known by the host to present a danger to the guest, and which he also knows the guest will not, in the exercise of reasonable care, discover and avoid for himself. In summary, some of the courts have equated the rule of legal liability with that of homely hospitality, saying that the host should treat the guest as a member of the family, and the guest, on the other hand, should accept the conditions ordinarily prevalent in his host's home without cavil or complaint."

Similarly we find in *Prosser on Torts*, (1955) 2d. Ed., Par. 77, pages 447 and 448:

"Thus all of the decisions are agreed that a social guest, however cordially he may have been invited and urged to come, is not in law an invitee, but is nothing more than a licensee, to whom the possessor owes no duty of inspection and affirmative care to make the premises safe for his visit. The reason usually given is that the guest understands when he comes that he is to be placed on the

same footing as one of the family, and must take the premises as the occupier himself uses them, without any preparation for his safety; and that he understands that he must assume the risk of defective conditions unknown to the occupier, and is entitled at most to a warning of dangers that are known. There has been some under-current of dissent, as to whether this is really in accord with present social customs, and some writers have urged that the guest be treated as an invitee, but thus far the courts have not been induced to change their position."

(The latter portion cites *Scheibel v. Lipton*, 1951, 156 Ohio St. 308, 102 N. E. 2d 453, and *Laube v. Stevenson*, 1951, 137 Conn. 469, 78 A. 2d 693.)

If we eliminate the liability of anyone for active negligence or wilful or wanton misconduct, which are not dependent upon or necessarily associated with the occupation of premises, we come down to a simple consideration of the duty of the host to a social guest for the condition of his premises. Basically that duty, according to the foregoing texts, is not to expose the guest to hidden danger amounting to a trap or hidden or concealed dangerous condition of which the host has knowledge and concerning which the host has reason to believe the guest has no knowledge. The foregoing seems to be the general rule and thus far no court of last resort has held otherwise. There is no duty upon the occupier of premises to make the premises safe to avoid injury to a social guest as there is to the occupier of premises to a business guest.

A leading case in the United States is that of *Comeau v. Comeau*, 1934, 285 Mass. 578, 189 N. E. 588, 92 A. L. R. 1002, where the guest fell on a broken sidewalk leading from the public sidewalk to the host's home, it was held that:

"A guest enjoying by invitation unrecompensed hospitality at the house of another, must be presumed to accept such generous entertainment with the understanding that he accommodates himself to the conditions of his host. He can not ask for better things than the latter possesses.

"It is difficult to import into such relationship a duty on the part of the host to make improvements or reconstructions because thereby his home may be more convenient or more safe for those accepting his gratuitous hospitality. The guest must accept the premises as he finds them." Citing *Southcote v. Stanley*, 1 Hurl. & N. 247.

In that case it was also held, following a number of earlier cases:

"In such circumstances, the host as licensor is held to be under no liability unless the proximate cause of injuries to the guest is something in the nature of a trap or active negligence."

A casual examination of the text and early authorities would lead one to believe that the law on this subject is well settled and that the duty owed by a host to a social guest as respects the condition of the premises is practically non-existent. However, recent cases indicate a tendency to fail to apply what would appear to be a simple rule in considering the duty of the host to his social guest. These cases go to some length in the opinions and indicate a great deal of uncertainty.

In other words, we are beginning to notice a trend now toward breaking down the old rule of protecting the possessor of property from ordinary claims of negligence in the maintenance of the premises made against him by one in the position of a social guest. Since any condition that causes injury is a dangerous condition from the injured person's point of view, and since one who is invited upon the premises of another is certainly not a trespasser but should be entitled to some measure of protection, we find the courts leaning towards applying the rule of care to a social guest similar to that of a business guest or invitee.

In a recent Ohio case (1951) *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N. E. 2d 453:

It appeared that one Lipton and his wife owned and occupied a dwelling in Youngstown, Ohio. They invited one Scheibel and his wife to spend the evening in their home as their social guests. Mrs. Scheibel arrived but Mr. Scheibel was detained elsewhere on business and was to arrive later. Before Mr. Scheibel's arrival, Mrs. Scheibel and the Liptons went calling, leaving the house dark except for a light in the kitchen.

They had not returned when Mr.

Scheibel arrived to pick up his wife to take her home.

There was a cement driveway extending from the street along the side of the house and a sidewalk from this driveway across the front of the house to a front entranceway. When Mr. Scheibel arrived, he parked his car across the street and then, instead of walking up the driveway and across this private sidewalk in front of the house to the front door, he walked over the front lawn and when he found the front door locked, no one at home and the house dark, he started to return over the front lawn when he fell in a hole near this private walk and received injuries.

The hole was a depression in the lawn near this walk resulting from the previous removal of a shrub and was "saucer shaped" about a yard in diameter and a foot deep which the darkness of night prevented him from seeing.

Since the writer was involved in the defense of this case, it may be of some interest to defense counsel to know that in the trial of this case before the common pleas court the owners of the home, who were joint parties defendant, were called for cross-examination (permitted under the Ohio statute). Then the plaintiff and his wife testified and obviously, defense counsel had no witnesses to produce on the facts.

The trial court took the position that since the plaintiff was expressly invited to come to the defendant's home, although for social purposes only, he became an invitee in the eyes of the law and the court so charged the jury and imposed upon the owners of the home all the duties of exercising ordinary care to keep the premises in reasonably safe condition, including a warranty that the premises were in reasonably safe condition, and the court of appeals affirmed the judgment for the plaintiff rendered by the common pleas court.

The supreme Court of Ohio, in a 25 page opinion in this case, reviewed the law as set forth in the Restatement of the Law of Torts, quotations from various legal text books and various decisions, and held as a matter of law that the condition in the instant case did not create an unreasonable risk and rendered final judgment for the defendants.

We find, therefore, that the actual finding of the court based upon the facts in the case is consistent with the general rule followed in other states, however, we are considerably perturbed by some *obiter dictu* in this opinion—we quote:

> "A reasonable solution of the difficulty of forcing social guests in any one of the three molds commonly recognized, to-wit: trespasser, licensee or invitee, is solved by ceasing such effort and merely considering and discussing social guests as *social guests* and by referring to the one owing the duty and obligation to the guest as a host."

The foregoing is in spite of the previous statement of this court in *Soles v. Ohio Edison Co.*, 144 Ohio St. 373 at 377, 59 N. E. 2d 138:

> "Where one goes upon the land of another he is either an invitee, a licensee, or a trespasser."

Our feeling is that this "reasonable solution," attempting to create a legal status for a special guest between a licensee and invitee, violates the fundamental classification under the common law uniformly followed by all courts, and creates a duty upon the host greater than imposed upon him by law to a licensee and yet supposedly somewhat less than that owed to a business guest or invitee.

But taking this artificially created status of "social guest" the Ohio Supreme Court incorporated in its syllabus of this case the following further *obiter dictu*:

> "That duty of the host, in our judgment, is to exercise ordinary care not to cause injury to his guest by any act of the host or by any activity carried on by the host while the guest is on the premises. *Coupled with this is the duty of the host to warn the guest of any condition of the premises known to the host and which one of ordinary prudence and foresight in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover such dangerous condition.*"

The foregoing duty could easily be construed as a duty to exercise ordinary care and appears to be inconsistent with the

court's judgment. It substitutes for a condition constituting a trap or unreasonable risk of harm any condition which might cause injury to a guest. It attempts to set forth a duty different from that of ordinary care, but upon which analysis is nothing more nor less than one portion of the duty of ordinary care.

Under this syllabus—which is the law of the case in Ohio—trial courts seemingly should submit all such cases to the jury and simply read to the jury the duty of care as set forth in the syllabus, unless reasonable minds could not differ on the particular case.

It might be worthy of note that the dissenting opinion of two judges in this case held the host should have been charged with the duty of exercising ordinary care, as had the common pleas court and the three judges of the court of appeals.

In the case of *Laube v. Stevenson*, 1951, 137 Conn. 469, 78 2d 693, 25 A. L. R. 2d 592:

> A mother visited in the home of her daughter and assisted some in the care of her grandchild. The daughter sent her mother to the basement for a blanket for the baby. The stairs leading to the basement were cluttered with a vacuum cleaner on one side and an ironing board on the other side; had no lighting fixture, no hand rail, broken nosing and slippery linoleum. This fact was known to the daughter and her husband but not to the mother who fell and was injured. In the suit by the mother against her daughter and son-in-law, the court held that the mother was a gratuitous licensee and not an invitee, and permitted a recovery against the daughter for a failure to warn the mother of a condition which the daughter knew was dangerous and should have realized the mother was unfamiliar with, but the court let the husband out on the theory that the husband was unaware of the presence of the mother-in-law and that he would not be expected to know that she would go to the basement, and that she would not have done so without the request from the daughter, who was not acting as agent for her husband.

Perhaps in this case defense counsel were confronted with the situation where the daughter would not help to establish the fact that the mother was probably familiar with these steps and the untidy way her daughter kept house.

This case was really decided on the theory of a "positive act of negligence or a failure of duty which was the equivalent of such act." In other words, if one knows of a dangerous condition, which he has reason to believe another does not know about, and he causes that person to go upon the dangerous condition, he can be held liable and that duty is independent of his occupancy of land.

The court also cited with approval *Restatement* 2 *Torts*, Par. 342:

> "A possessor of land is subject to liability for bodily harm to gratuitous licensees by a natural or artificial condition thereon if, but only if, he
>
> (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and
>
> (b) invites or permits them to enter or remain upon the land, without exercising reasonable care
>
> (i) to make the condition reasonably safe, or
>
> (ii) to warn them of the condition and the risk involved therein."

In one dissenting opinion in this case, the judge stated he personally felt that a social guest should be treated as a business guest; and in another dissenting opinion the judge stated that since the owner of an automobile owed a guest passenger the duty of ordinary care (no guest statute in Connecticut) the rule should be the same as to a social guest.

These courts, in our opinion, lose sight of the fact that a guest passenger in an automobile can recover only for active misconduct of the driver and that duty we restate attaches to every one irrespective of ownership of property, real or personal.

The confusion present in the minds of some of the courts was further illustrated by the case of *Droge v. Czarniechi*, 126 N. Y. S. 2d 794 (1953). In this case a child at a party slipped on a rug on a waxed floor. Here again the trial court rendered judgment for the plaintiff. This was how-

ever reversed and final judgment rendered for the defendant by the appellate division in a split decision. *Droge v. Czarniechi,* 139 N. Y. S. 2d 314.

Another recent case is that of *Taneian v. Meghrigian, et al,* 15 N. J. 267, 104 Atl. 2d 689 (1954). In this case defendants, Meghrigian and Najarian were co-owners of an apartment house. Najarian was a third floor tenant in this apartment house. The plaintiff was a social guest of Najarian. After the plaintiff completed a visit with Najarian and while leaving the apartment building by means of a common stairway, the plaintiff fell because of the poor lighting on the stairway. The Supreme Court of New Jersey in holding that these facts created a jury question wrote a very confused opinion and suggested that perhaps there should be no differentiation made between active negligence of a host and passive neglect of the host's premises. Apparently, however, the real reason for permitting recovery in this case was that the plaintiff was not a social guest on the premises of the host but actually was at the time of the accident a guest of a tenant on a common stairway to whom the owners of the apartment building would owe a duty of exercising ordinary care.

A recent English appellate court case is interesting since it appears to reverse the earlier English cases which were the foundation for the present American rule. *Hawkins v. Coulsdon and Purley Urban District Council,* (1954) 1 Q. B. 319, 2 W. L. R. 122. In this case plaintiff was the social guest of a tenant in a public housing unit and fell on a common stairway which was defective. The appellate court affirmed the judgment for the plaintiff with separate and entirely different opinions rendered by the three Lord Judges, all of whom, however, agreed that the plaintiff was a licensee. Some of the comments of these judges are interesting.

Somervell, L. J.:

"The duty of a licensor is to warn licensees of any unusual or concealed danger of which he knows, which would not be obvious to a reasonably careful person."

He then goes on to apply what he calls the "objective" theory, i.e., not what the licensor did foresee but what the licensor should have foreseen, and finds that a broken step constituted an unusual danger.

Deming, L. J., said inter alia:

"I propose, therefore, to put the law of gifts to one side and to consider simply the law of licensees: and as to them I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission."

In the United States these facts would have presented a jury question for the reason that the plaintiff was not actually upon the premises of the host, at the time of the accident, but was injured while on a common stairway of an apartment building where she had a right to be as a guest of a tenant.

In conclusion, we submit that social conditions creating the relationship of host and guest have been with us for countless generations. Under the common law and the general rule adopted by all states, a social guest is nothing more or less than a gratuitous licensee. He is presumably of the same social status as the host; should reasonably know what to expect and what to anticipate with reference to the condition of the premises of his host.

It would seem that a person should have the right to purchase a home of any type which he might desire and fit it up for himself and family without incurring an obligation similar to that owed by the proprietor of a store who prepares it for occupancy. If one desired to occupy an early American home with steep stairs and narrow treads, or install rustic steps or passageways of irregular height, it would seem that he should be permitted to do so without incurring an obligation to have the premises comply with all of the requirements of a storekeeper who opens a store to the general public, and without incurring the obligation of warning the guest of a condition to which he and his family had accommodated themselves for some time and without incurring an obligation to warn the guest of each and every condition which perchance might develop to be of some danger to the guest.

We sincerely trust that in this line of cases, at least, the trial courts resist their their apparent human tendency to submit all cases to a jury under some conceivable theory of duty upon the party sued.